No. 17-____

IN THE

Supreme Court of the United States

THE AMERICAN LEGION, *ET AL.*,

Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the decision below, the Fourth Circuit held that a 93-year-old memorial to the fallen of World War I is an unconstitutional establishment of religion, merely because it is shaped like a cross. The Fourth Circuit reached this conclusion even though the memorial was designed to be a war memorial, has only ever been a war memorial, has only ever been regarded by the community as a war memorial, and is on public land only because of traffic safety concerns that arose 40 years after the memorial was built. The questions presented are:

1. Whether a 93-year-old memorial to the fallen of World War I is unconstitutional merely because it is shaped like a cross.

2. Whether the constitutionality of a passive display incorporating religious symbolism should be assessed under the tests articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Van Orden v. Perry*, 545 U.S. 677 (2005), *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), or some other test.

3. Whether, if the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), applies, the expenditure of funds for routine upkeep and maintenance of a cross-shaped war memorial, without more, amounts to an excessive entanglement with religion in violation of the First Amendment.

PARTIES TO THE PROCEEDING

Petitioners are The American Legion, The American Legion Department of Maryland, and The American Legion Colmar Manor Post 131. Respondents are the American Humanist Association, Steven Lowe, Fred Edwords, and Bishop McNeill, who were plaintiffs in the District Court, as well as the Maryland-National Capital Park and Planning Commission, which was a defendant in the District Court.

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OPINIONS BELOW

The Fourth Circuit panel's decision appears at 874 F.3d 195 and is reproduced at Pet. App. 1a. The Fourth Circuit's unreported order denying rehearing *en banc* is reproduced at Pet. App. 82a. The District Court's decision appears at 147 F. Supp. 3d 373 and is reproduced at Pet. App. 50a.

JURISDICTION

The Fourth Circuit's order granting summary judgment to Respondents American Humanist Association, Lowe, Edwords, and McNeill was entered on October 18, 2017. Pet. App. 1a. Petitioners filed a timely petition for rehearing *en banc*, which was denied on March 1, 2018. Pet. App. 82a-84a. The Chief Justice extended the time for filing this petition to June 29, 2018. *See* No. 17A1201. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., amend. 1.

INTRODUCTION

In the decision below, the Fourth Circuit held that a 93-year-old memorial to the 49 men of Prince George's County, Maryland, who died in World War I ("WWI") was unconstitutional, merely because the Memorial's private builders chose, decades before any government became involved, to commemorate their loved ones with a cross. According to the Fourth Circuit, because crosses are "the hallmark symbol of Christianity," with "many years of accrued religious symbolism," the "inherent religious meaning" of a cross mandates that no matter how admittedly secular the government's motives and the display's history may be, "any reasonable observer [would conclude] that the [government] either places Christianity above other faiths, views being American and Christian as one in the same, or both." Pet. App. 18a-19a, 28a (panel opinion), 89a (Wynn, J., concurring in denial of *en banc* rehearing). A sharply divided Fourth Circuit denied *en banc* review by a vote of 8-6.

The Fourth Circuit's decision is wrong in the extreme and conflicts with decisions of this Court and other Courts of Appeals. No other Court of Appeals has held that a longstanding veterans memorial, created to be a veterans memorial, and consistently used and regarded by the community as a veterans memorial, violates the Establishment Clause. And for good reason: The Establishment Clause "does not oblige government to avoid any public acknowledgement of religion's role in society," nor does it "require eradication of all religious symbols in the public realm." *Salazar v. Buono*, 559 U.S. 700, 718-19 (2010) (plurality opinion).

The decision below flouts the "benevolent neutrality" called for by the Establishment Clause, *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970). It instead mandates a "'brooding and pervasive'" discrimination against "all that in any way partakes of the religious," singling out symbols with religious significance for condemnation even when used to pursue plainly secular purposes. *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J.) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)). Not surprisingly, the Fourth Circuit's decision directly conflicts with decisions from the Second, Fifth, and Tenth Circuits, which have recognized that, notwithstanding a cross's obvious religious significance, a government may use a cross to reflect secular, historical events with which a cross has become associated.

Left undisturbed, the decision below will have enormous consequences. Most immediately, it will require the state government to destroy or disfigure the Memorial itself—during oral argument, the author of the panel opinion twice suggested cutting off the arms of the cross to remedy the perceived violation.[1] But it will also render unconstitutional the two principal WWI memorials in Arlington National Cemetery, which likewise are freestanding crosses residing in the Fourth Circuit. Further, the decision casts doubt on hundreds of similar monuments using crosses to commemorate lives lost in war, and the

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[1] *See* Oral Argument at 11:00-11:15, 22:00-22:17, *Am. Humanist Assoc. v. M-NCPPC*, No. 15-2597, http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments (Dec. 7, 2016).

many other ways crosses have been used to solemnize or commemorate secular events throughout our Nation's history.

The decision below, however, is not simply a result of the Fourth Circuit's misunderstanding of the law, but is a product of the confused state of this Court's Establishment Clause jurisprudence. As most Justices of this Court have observed, and as the District Court here recognized, "Establishment Clause jurisprudence is a law professor's dream, and a trial judge's nightmare." Pet. App. 63a. Indeed, the Court's failure to provide clear standards has led to disagreement among the circuits about such basic matters as what test to apply, whether displays should be evaluated from the perspective of a passing motorist or a historically-informed observer, and whether merely owning and maintaining a display constitutes an "excessive entanglement" with religion.

Nonetheless, there is no doubt that this Monument would survive any test adopted by this Court—whether based on *Van Orden*, the *Lemon*/endorsement/reasonable observer test, or *Town of Greece*. The common thread uniting these decisions provides the appropriate rule of decision here: A government's use of religious imagery in a way consistent with the Nation's historical traditions will not run afoul of the Establishment Clause absent a showing that the government was exploiting the tradition to coerce religious belief or observance by nonadherents. No such circumstances are present here.

This Court should grant certiorari to clarify that a longstanding war memorial commemorating a

secular, historical event does not violate the Establishment Clause merely because it uses a cross.

STATEMENT OF THE CASE

A. History Of The Memorial

The Bladensburg WWI Memorial is a Celtic-styled Latin cross standing on a large pedestal. Pet. App. 97a. The American Legion's symbol is displayed at the intersection of the cross's horizontal and vertical arms, and the words "VALOR," "ENDURANCE," "COURAGE," and "DEVOTION" are inscribed at its base. Pet. App. 52a. On the pedestal is a large plaque which declares the monument "DEDICATED TO THE HEROES/OF PRINCE GEORGE'S COUNTY, MARYLAND WHO LOST THEIR LIVES IN/THE GREAT WAR FOR THE LIBERTY OF THE WORLD." *Id.* The plaque lists the 49 local men who died in WWI, gives the dates of American involvement in the war, and concludes with a quote from President Wilson's address to Congress requesting a declaration of war. *Id.*

The Memorial was constructed between 1919 and 1925 by the American Legion and a committee of mothers whose sons died in WWI. Pet. App. 52a-56a. The Committee chose to design the Memorial in the shape of a cross to mirror the cross-shaped gravemarkers under which their sons and comrades were buried in American overseas cemeteries. Pet. App. 74a. Because a significant number of American casualties were buried overseas, this type of "surrogate gravesite[]" became common following WWI. CA JA1911. As the mother of one of the men honored explained in a letter to a U.S. Senator, "[T]he chief reason I feel so deeply in this matter, my son,

Wm. F. Redman, lost his life in France and because of that I feel that our memorial cross is, in a way, his grave stone." Pet. App. 102a.

The Committee's decision to use a cross-shape reflects the fact that, in the aftermath of WWI, crosses became a strong cultural image of the fallen. *See Buono*, 559 U.S. at 721 (plurality opinion) (noting a WWI memorial cross "evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles"). In fact, even Respondents' expert has acknowledged that during and immediately after WWI, crosses "developed into a central symbol of the American overseas cemetery," Pet. App. 74a (quoting G. Kurt Piehler, REMEMBERING WAR THE AMERICAN WAY 101 (2004)), and "quickly emerged as a cultural image of the battlefield," G. Kurt Piehler, *The American Memory of War*, THE AMERICAN EXPERIENCE OF WAR 232 (2010). As Congress observed when replacing the temporary wooden cross gravemarkers with permanent cross and Star of David headstones, the markers had become "symbols . . . emblematic of the great sacrifices which [the] war entailed," "peculiarly and inseparably associated" with the fallen due to widespread imagery in art and poetry. H.R. Res. 15, 68th Cong. at 1 (1924); *see also* Pet. App. 74a.

The Memorial was originally built at the end of the National Defense Highway (another WWI memorial). Pet. App. 52a-53a. However, as the roads grew busier and expanded in the following decades, the Memorial ended up in the median of an intersection. Pet. App. 56a-57a, 69a. After the State determined that it was unsafe for the Legion to continue owning the median, the Legion agreed in

1961 to deed the land to the Maryland-National Capital Park and Planning Commission. Pet. App. 56a-57a, 77a. Since then, the Commission has owned the Memorial and provided routine groundskeeping, illumination, and occasional repairs. Pet. App. 59a-60a.

For over 90 years, the Bladensburg community has used the Memorial exclusively for commemorative purposes. For example, the American Legion hosts annual Veterans Day and Memorial Day events at and around the Memorial. Pet. App. 58a-59a. In stark contrast, the record mentions only one religious event ever planned to occur at the Memorial: A 1931 Washington Post article notes an out-of-town preacher planned to hold a series of three "Sunday services" at the Memorial. *See* Pet. App. 38a (citing CA JA347). Nothing in the record indicates these services actually occurred, nor that any member of the Bladensburg community has used the Memorial for anything other than commemorative purposes. The record also indicates no religious use of the Memorial in the 50-plus years the Commission has owned it.

Similarly, during these 90 years, the Bladensburg community has responded to the Memorial by surrounding it with additional monuments to those lost in the Nation's conflicts. Pet. App. 57a-58a. Again, in stark contrast, the record contains no mention of any religious monuments added near the Memorial, or any indication the community interpreted the Memorial's message to be religious rather than commemorative.

Thus, the Memorial now stands in an area known as "Veterans Memorial Park," surrounded by: (1) a World War II Honor Scroll; (2) a Pearl Harbor

Memorial; (3) a Korea-Vietnam Veterans Memorial; (4) a September 11 Memorial Garden; (5) a Battle of Bladensburg Memorial; and (6) two 38-foot-tall soldier statues, one British and one American, facing each other across a bridge. *Id.*; Pet. App. 105a-107a, 108a-109a (map of area). These monuments vary in size; some are as tall as the 32-foot Memorial, others are shorter but broader, and some are smaller than the Memorial. *Id.* But all express the same message: commemoration of the fallen of the Nation's conflicts.

B. Procedural History

In 2012, the American Humanist Association lodged the first and only known complaint against the memorial, alleging that its presence on public land violates the Establishment Clause. Pet. App. 38a, 98a-99a. After the AHA commenced this lawsuit in 2014, the District Court ruled the memorial was constitutional, granting summary judgment to the American Legion and the Commission. Pet. App. 81a. Explaining that "Establishment Clause jurisprudence is a law professor's dream, and a trial judge's nightmare," the District Court found the Memorial survives constitutional scrutiny under "both the *Lemon* test and . . . *Van Orden*." Pet. App. 63a, 79a.

In a 2-1 decision, the Fourth Circuit reversed. The majority acknowledged the government had articulated "legitimate secular purposes for displaying and maintaining the [Memorial]," which contained "secular elements." Pet. App. 16a, 21a. However, explaining that "[t]he Latin cross is the 'preeminent symbol of Christianity,'" and that the court "simply cannot ignore the fact that for thousands of years the Latin cross has represented Christianity," the majority held that crosses possess

an "inherent religious meaning" that "easily overwhelm[ed]" the government's secular purposes and the Memorial's history. Pet. App. 17a-22a. The majority also held that the government had excessively entangled itself with religion by spending funds to maintain the Memorial. Pet. App. 27a-28a.

Chief Judge Gregory dissented, observing that the majority had essentially adopted a "per se finding[] that all large crosses are unconstitutional despite any amount of secular history and context, in contravention of Establishment Clause jurisprudence." Pet. App. 43a. According to Chief Judge Gregory, the panel had "subordinate[d] the Memorial's secular history and elements while focusing on the obviously religious nature of Latin crosses themselves" and "construct[ed] a reasonable observer who ignores certain elements of the Memorial" because they are not immediately obvious to a passing motorist. Pet. App. 40a. Finally, he observed that excessive entanglement requires some engagement with religious institutions or promotion of doctrine, not "merely maintaining a monument within a state park and a median in between intersecting highways that must be well lit for public safety reasons." Pet. App. 48a-49a.

The Fourth Circuit denied *en banc* review by an 8-6 vote, over dissents by Chief Judge Gregory, Judge Wilkinson, and Judge Niemeyer. Pet. App. 83a-84a. Judge Niemeyer noted that the panel's decision "puts at risk hundreds, and perhaps thousands, of similar monuments," including "similarly sized monuments incorporating crosses in the Arlington National Cemetery." Pet. App. 99a-101a. And he observed that "[i]t strains established judicial analysis to conclude

that *Van Orden* does not allow the monument in this case to stand as a secular memorial to the lives of soldiers lost during war in service of the Nation." Pet. App. 101a.

Judge Wynn, a member of the panel, wrote separately to defend the panel's opinion and its *per se* rule prohibiting crosses on public land. For Judge Wynn, because "the Latin cross has for centuries been widely recognized as the pre-eminent symbol of Christianity," no amount of secular context or history could overcome crosses' "many years of accrued religious symbolism." Pet. App. 85a, 89a (internal quotation marks omitted). Thus, for Judge Wynn, because "[n]othing in the First Amendment empowers the judiciary to conclude that the freestanding Latin cross has been divested of [its] predominantly sectarian meaning" in global history, the panel was right to conclude that the Memorial was unconstitutional. Pet. App. 85a-86a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH PRECEDENT OF THIS COURT AND DECISIONS FROM OTHER COURTS OF APPEALS

In the decision below, the Fourth Circuit held that a 93-year-old memorial to the fallen of WWI violates the Establishment Clause, merely because the Memorial's private builders chose to use a cross to mirror the battlefield graves where their comrades and sons were buried. This decision conflicts with this Court's precedent and decisions from three other Circuits, which have recognized that a government may use a cross when commemorating a secular, historical event. Unless this Court intervenes, the Fourth Circuit's decision threatens hundreds of longstanding memorials across the country, including the two principal WWI memorials at Arlington National Cemetery, within the Fourth Circuit's jurisdiction.

A. The Fourth Circuit's Decision Conflicts With This Court's Precedents

It is undisputed that the original builders of the Memorial created it to honor their sons and comrades who died in WWI; that when the Memorial was built, crosses were "peculiarly and inseparably associated" with the dead of WWI due to widespread imagery in art and poetry; that the private builders chose to use a cross specifically to mirror the soldiers' battlefield graves; that the Commission had no involvement with the Memorial until, decades after it was built, the Commission acquired it due to traffic safety concerns; that for nearly 100 years, the community has

consistently used the Memorial only for events honoring veterans; that the community has responded to the Memorial by surrounding it only with secular, commemorative symbols; and that the Memorial has always included secular elements, such as a plaque explaining the commemorative message it was meant to convey. Indeed, the Fourth Circuit acknowledged that the Commission has "legitimate secular purposes" for owning and maintaining the Memorial—namely, traffic safety, honoring veterans, and preserving a historically significant war memorial. Pet. App. 16a.

Yet, despite the Memorial's clear secular history and purpose, the Fourth Circuit held that the Memorial was unconstitutional because Latin crosses have an "inherent religious meaning" that "overshadows" the secular, commemorative message the Memorial was meant to convey. Pet. App. 17a-18a, 22a. As Chief Judge Gregory explained in his panel dissent, by focusing on the religious meaning of crosses, and ignoring the Memorial's secular origins, context, and content, the majority effectively adopted a "per se finding[] that all large crosses are unconstitutional despite any amount of secular history and context, in contravention of Establishment Clause jurisprudence." Pet. App. 43a.

No other court has gone so far as to hold that a longstanding, historical war memorial that was built to be a war memorial and has only ever been a war memorial was unconstitutional merely because its private builders chose to use a cross to honor their fallen loved ones. And for good reason—the decision below simply cannot be reconciled with the Establishment Clause or this Court's precedents.

This Court has been clear that the Establishment Clause "does not oblige government to avoid any public acknowledgement of religion's role in society," nor "require eradication of all religious symbols in the public realm." *Buono*, 559 U.S. at 718-19. The Clause has been implemented not through "a regime of total separation" "between Church and State," *Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973), but through a policy of "benevolent neutrality" that recognizes a wide range of "permissible state accommodation" of religion, *Walz*, 397 U.S. at 673. Indeed, "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

The panel's decision blatantly violates these principles. It singles out and condemns the Memorial merely because the Memorial's private builders chose to use a symbol that can have religious symbolism, decades before the government became involved. It focuses on the religious meaning of crosses generally rather than the clear secular purpose, history, and content of the Memorial itself. And it mandates discriminatory treatment for symbols with religious significance, expressing the very type of hostility to religion the Constitution seeks to avoid. Nothing in the Establishment Clause or this Court's precedents mandates that war memorials incorporating religious symbols should be treated worse than war memorials that do not include such symbols.

Quite the contrary—this Court has made clear that "the Establishment Clause of the First Amendment *allows* the display" of longstanding

monuments incorporating religious symbolism to convey a secular meaning. *Van Orden*, 545 U.S. at 681 (plurality opinion) (emphasis added). Indeed, as the plurality observed in *Buono*, "a Latin cross is not merely a reaffirmation of Christian beliefs," but "is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Buono*, 559 U.S. at 721. A cross thus "evokes far more than religion"—"[i]t evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten." *Id.*

The Fourth Circuit's decision to condemn the Memorial "based primarily on the religious nature of [a cross] . . . exhibit[s] a hostility toward religion that has no place in our Establishment Clause traditions, . . . encourage[s] disputes concerning the removal of longstanding [memorials] across the Nation, . . . [a]nd . . . create[s] the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 at 704 (Breyer, J., concurring in judgment).

B. The Fourth Circuit's Decision Conflicts With Decisions From The Second, Fifth, And Tenth Circuits

The Fourth Circuit's conclusion that the "inherently religious nature" of crosses mandates a *per se* prohibition against crosses on public land directly conflicts with the decisions of three other Circuits, which have held that a government's use of a cross to reflect a secular, historical event does not violate the Establishment Clause.

In *American Atheists, Inc. v. Port Authority*, for example, the Second Circuit concluded that including "The Cross at Ground Zero" in the National September 11 Museum had the effect of "ensuring historical completeness, not promoting religion." 760 F.3d 227, 243 (2d Cir. 2014). Two days after the September 11 terrorist attacks, a rescue worker at Ground Zero discovered "a large column and cross-beam, which gave him the impression of a Latin cross." *Id.* at 234. In the aftermath of the attacks, the cross became a gathering point for "persons of different faiths or of none at all," and it "came to be viewed not simply as a Christian symbol, but also as a symbol of hope and healing for all persons." *Id.* The cross undeniably had "religious significance to many" and had been used in religious rituals before being placed in the museum. *Id.* at 243-44. Yet the Second Circuit explained the reasonable observer would understand these "as historical facts significant to illustrating how human beings, notably Ground Zero rescue workers and the relatives of survivors, could find some source of hope and comfort even when confronting the extraordinary death toll and destruction of September 11." *Id.* at 243.

Similarly, the Fifth Circuit held in *Murray v. City of Austin* that the inclusion of "a Christian cross" in the insignia of the City of Austin did not violate the Establishment Clause because the design simply "incorporated . . . the family coat of arms of Stephen F. Austin, the 'Father of Texas' and the person after whom the City is named." 947 F.2d 147, 149 (5th Cir. 1991). The use of the coat of arms had "a long-standing unique history," and there was "absolutely no evidence of an intent to proselytize, or advance, any

religion." *Id.* at 155. In this context, the court concluded that "requiring the City to remove all displays of the insignia, arguably evinces not neutrality, but instead hostility, to religion." *Id.* at 158.

And in *Weinbaum v. City of Las Cruces*, the Tenth Circuit rejected an Establishment Clause challenge to the official seal of the City of Las Cruces, New Mexico, which "consists of three interlocking crosses surrounded by a sun symbol." 541 F.3d 1017, 1025 (10th Cir. 2008). Las Cruces was founded in 1849 near a makeshift cemetery where a virtual forest of wooden crosses marked the graves of "the victims of a series of massacres in the area." *Id.* at 1024. Thus the city was named *El Pueblo del Jardin de Las Cruces*, meaning "the City of the Garden of the Crosses"—which is "a Spanish euphemism for a cemetery." *Id.* at 1024-25. This "unique history" provided "compelling evidence" that the use of three crosses in the seal was "not religious at all," but "simply reflects the name of the City which, in turn, reflects a series of secular events that occurred near the site of the City." *Id.* at 1035.

The Fourth Circuit's decision cannot be reconciled with these decisions. As in *Port Authority*, where the Ground Zero Cross conveyed a historical message about how people responded to the tragedy of September 11 in its immediate aftermath, the Bladensburg Memorial conveys how people responded to the tragedy of the lives lost in WWI in that war's immediate aftermath. Similarly, as in *Murray*, the Commission's decision not to tear down the Memorial when it acquired the land reflected the Memorial's "unique history" and shows "absolutely no evidence of

an intent to proselytize, or advance, any religion." *Murray*, 947 F.2d at 155. And, as in *Weinbaum*, where the crosses on the City seal were meant to reflect the cross-shaped gravemarkers and the historical event that precipitated them, the Bladensburg Memorial here has the shape it does specifically to reflect the cross-shaped gravemarkers under which many of the fallen of WWI were buried.

None of these courts denied that a cross has a religious meaning to many people. But rather than concluding, as the Fourth Circuit did, that crosses are so "inherently religious" that the government must purge them from government land, these courts reached the sensible conclusion that the government's use of a cross for historical, secular reasons did not amount to a violation of the Establishment Clause.

C. The Fourth Circuit's Focus On The "Inherent Religious Nature" Of Crosses Puts At Risk Hundreds Of Monuments

Most immediately, the Fourth Circuit's decision will likely lead to the destruction or disfigurement of the Memorial itself, a cherished landmark in the community that has stood for nearly 100 years in honor of the men of Prince George's County who gave their lives in WWI. Indeed, during oral argument, the author of the panel decision twice suggested cutting off the arms of the cross to remedy the violation. *See* Oral Argument at 11:00-11:15, 22:00-22:17, *Am. Humanist Assoc. v. M-NCPPC*, No. 15-2597, http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments (Dec. 7, 2016).

The Fourth Circuit's decision, however, also directly calls into question the constitutionality of the

two principal WWI memorials in Arlington National Cemetery, which is also within the Fourth Circuit. Pet. App. 97a (Niemeyer, J., dissenting from denial of rehearing en banc). In particular, the Canadian Cross of Sacrifice is a 24-foot granite cross donated by the Canadian government to honor Americans who fell in WWI. *Canadian Cross of Sacrifice*, Arlington National Cemetery, http://goo.gl/R0wVIJ. And the Argonne Cross is a 13-foot-tall Latin cross of white marble commemorating American servicemembers who died fighting in France during WWI. *Argonne Cross*, Arlington National Cemetery, http://goo.gl/t3Rvra.

The Fourth Circuit gave little reason to believe that these monuments will survive its analysis. It suggested only that the Arlington memorials might be distinguishable because they are smaller and because Arlington National Cemetery contains *more* religious symbols than Veterans Memorial Park. Pet. App. 26a-27a. But this makes little sense. Surely, the eight-foot difference in height between the 32-foot Memorial and the 24-foot Canadian Cross of Sacrifice carries no constitutional significance. And the fact that the memorials in Arlington are surrounded by other "religious symbols," while the Bladensburg Memorial is surrounded only by other war memorials suggests, if anything, that the Arlington monuments are *more* likely sending a religious message. There is no persuasive reason to distinguish the cross-shaped WWI memorials in Arlington, as the Fourth Circuit tacitly acknowledged when it went out of its way to preserve a challenge to them. *See* Pet. App. 26a, n.16 (noting that the panel was "not deciding or passing

judgment on the constitutionality of Arlington National Cemetery's display of Latin crosses").

More generally, the Fourth Circuit's reasoning, if adopted by other Circuits, effectively spells the doom of hundreds of war memorials that use crosses to commemorate the fallen. *See, e.g., Trunk v. City of San Diego*, 660 F.3d 1091, 1100 (9th Cir. 2011) (Bea, J., dissenting) (noting that at least 114 Civil War monuments include a cross). Indeed, the decision extends beyond war memorials, calling into doubt many other ways in which governments have historically used crosses to solemnize and commemorate secular events. These include, among many others, the National Fallen Firefighters Memorial (a national memorial honoring fallen firefighters topped by a Maltese Cross, the traditional symbol of the fire service), *see* National Fallen Firefighter Foundation, http://goo.gl/1HbqAW; the Cape Henry Memorial Cross (a tribute to the English colonists who landed in 1607 and erected a wooden cross "in prayer for a safe arrival to this new land"), *see Cape Henry Memorial Cross*, National Parks Service, https://goo.gl/pBrYnJ; and numerous medals of valor that take the form of a cross, *see* 10 U.S.C. § 3742 (Distinguished Service Cross); 10 U.S.C. § 6242 (Navy Cross); 10 U.S.C. § 6245 (Distinguished Flying Cross). Indeed, under the decision's logic, a large Star of David monument, such as a memorial in Columbia, South Carolina, remembering the liberators and victims of Holocaust concentration camps, is almost surely forbidden. *See Memorial Park*, http://www.columbiasouthcarolina.com/memorialpark.html.

II. THE COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE IS CAUSING CONFUSION AND INCONSISTENT RESULTS IN LOWER COURTS

A. Courts And Commentators Have Recognized That Establishment Clause Jurisprudence Is In "Shambles"

As Justice Thomas has noted, the Court's Establishment Clause jurisprudence "has confounded the lower courts and rendered the constitutionality of displays of religious imagery on government property anyone's guess." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting). At least eight other current and recent members of this Court have also called for clarification in this area of law.[2] And lower courts and

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[2] *See Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (calling attempts "to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon v. Kurtzman*" a "sisyphean task"); *Wallace v. Jaffree*, 472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting) ("[T]he *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests."); *id.* at 90–91 (White, J., dissenting); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring in judgment) ("[T]his action once again illustrates certain difficulties inherent in the Court's use of the test articulated in *Lemon v. Kurtzman*."); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice."); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) ("[A] majority of the Justices on the current Court . . . have, in separate opinions, repudiated the brain-spun '*Lemon* test'"); *Am. Atheists, Inc. v. Davenport*,

commentators across the country agree. As the Sixth Circuit noted when trying to apply this Court's Establishment Clause jurisprudence, "[o]ften it is not entirely clear precisely what test the Court applies, or how the Court's approach should be characterized." *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 599 (6th Cir. 2015). The list goes on.[3] Perhaps the only thing that is clear about the Court's Establishment Clause jurisprudence is that it needs clarification.

B. This Confusion Has Led To Many Disagreements Among The Circuits

Given the state of this Court's Establishment Clause jurisprudence, it is no surprise that circuit splits abound as courts attempt to make some sense of this confusion. Even beyond the question of

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637 F.3d 1095, 1110 (10th Cir. 2010) (Gorsuch, J. dissenting from denial of rehearing en banc) ("[W]hether even the true reasonable observer/endorsement test remains appropriate for assessing Establishment Clause challenges is far from clear."); *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2535 (2012) (Alito, J., concurring in denial of certiorari) ("This Court's Establishment Clause jurisprudence is undoubtedly in need of clarity[.]").

[3] *See Freethought Soc. of Greater Phila. v. Chester County*, 334 F.3d 247, 256 (3d Cir. 2003) (process for determining which test applies is "somewhat murky"); *Bauchman v. W. High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) (struggling to glean "an appropriate standard" from the Supreme Court's "muddled Establishment Clause precedent"); Emily Fitch, *An Inconsistent Truth: The Various Establishment Clause Tests As Applied in the Context of Public Displays of (Allegedly) "Religious" Symbols and Their Applicability Today*, 34 N. Ill. U. L. Rev. 431, 444-45 (2014) ("The test, though well intended, has been applied arbitrarily, which has created confusion within the court system.").

whether the Establishment Clause permits governments to display cross-shaped war memorials, this case implicates several distinct splits among the circuits on other key issues including, for example, the appropriate test for evaluating passive displays, the scope of this Court's decision in *Van Orden*, how to apply the reasonable observer standard, and whether the mere ownership and maintenance of a passive display can impermissibly entangle the government with religion.

1. The Circuits Are Split About What Test To Apply To Passive Displays

At the most fundamental level, the courts of appeals disagree even over what test to apply to passive displays that include religious symbols. The court below and the Second, Sixth, and Tenth Circuits continue to apply a test variously called the *Lemon* test, the endorsement test, and the reasonable observer test ("the *Lemon*/endorsement/reasonable observer test"). In so doing, these courts analyze religious displays under the three prongs articulated in *Lemon*: secular purpose, primary effect, and excessive entanglement, even though "the *Lemon* test has been much criticized." *Port Auth.*, 760 F.3d at 238 & n.12; *see also ACLU of Ky. v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005); *Felix v. City of Bloomfield*, 841 F.3d 848, 856 (10th Cir. 2016); Pet. App. 13a.

Courts in the Eighth and Ninth Circuits, however, read *Van Orden* to either modify or carve out an exception to *Lemon* for passive displays, and have thus applied this Court's *Van Orden* framework. *See Red River Freethinkers v. City of Fargo*, 764 F.3d 948, 949 (8th Cir. 2014) ("A passive display of the Ten

Commandments on public land is evaluated by the standard in *Van Orden v. Perry*, which found *Lemon v. Kurtzman* 'not useful in dealing with [a] passive monument.'") (citations omitted). In fact, the Ninth Circuit has explicitly developed a "limited exception to the *Lemon* test" for religious displays "closely analogous to that found in *Van Orden*." *Card v. City of Everett*, 520 F.3d 1009, 1021 (9th Cir. 2008). *See generally Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (recognizing that "*Van Orden* expressly establishes an 'exception' to the *Lemon* test in certain borderline cases" but nonetheless applying both *Lemon* and *Van Orden* due to the lingering uncertainty surrounding this Court's Establishment Clause jurisprudence). Accordingly, courts in these circuits look primarily to the factors outlined in *Van Orden*—including the monument's history, setting, and purpose—when assessing the constitutionality of a passive display.

2. The Circuits Disagree Over How To Apply The Reasonable Observer Standard

Even among those courts that apply the reasonable observer standard, there is significant disagreement over what the hypothetical reasonable observer should know. In some cases, this so-called "'objective observer' is presumed to know far more than most actual members of a given community." *Weinbaum*, 541 F.3d at 1031 n.16; *see also Americans United For Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1550 n.7 (6th Cir. 1992) (en banc) ("[T]he reasonable observer used in the resolution of these cases must be an observer in possession of all of the relevant facts.").

In other cases, however, this observer appears to be anything but informed, objective, and reasonable. Rather, for many courts, the reasonable observer possesses only the knowledge of an average passer-by who takes a quick glance at the display and immediately draws conclusions. *See, e.g., Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1121 (10th Cir. 2010) (roadside cross memorials evaluated from the perspective of a passing motorist). This is the approach taken below. *See* Pet. App. 24a (evaluating the Memorial from the perspective of "passers-by"). As courts have observed, the lack of clarity on this question renders the *Lemon*/reasonable observer/endorsement test unworkable and opens the door to manipulation through "selectivity of the knowledge of the plaintiffs' reasonable observer." *Grand Rapids*, 980 F.2d at 1550 n.7. *See also Davenport*, 637 F.3d at 1108 (Gorsuch, J., dissenting from denial of rehearing en banc) ("[O]ur observer continues to be biased, replete with foibles, and prone to mistake."); *Skoros v. City of New York*, 437 F.3d 1, 50-51 (2d Cir. 2006) (highlighting disagreement over whether the appropriate standard is a "reasonable student observer," a "reasonable parent observer," or a "hypothetical non-student 'adult' observer").

3. The Decision Below Created A Circuit Split Over Whether Expenditures For Routine Maintenance Constitute Excessive Entanglement

Finally, the Fourth Circuit's decision here created a new circuit split over whether a government's expenditure of funds for routine maintenance of a passive display that includes a religious symbol,

without more, can violate *Lemon*'s "excessive entanglement" prong. The Fourth Circuit concluded that the Commission's "own[ership] and maint[enance] [of] the Cross" constituted "excessive entanglement" because "[t]he Commission has spent at least $117,000 to maintain" the Memorial over the 55-plus years it has owned it, and because, according to the panel, "the Commission is displaying the hallmark symbol of Christianity in a manner that dominates its surroundings." Pet. App. 27a-28a.

Yet the Sixth Circuit has determined that no excessive entanglement existed from a "city's ownership and maintenance" of a public "friendship bell" that was "strongly associated with Buddhist monasteries . . . much as crosses indicate Christian churches." *Brooks v. City of Oak Ridge*, 222 F.3d 259, 265-66 (6th Cir. 2000). And the Oregon Supreme Court has similarly held that a city's ownership and maintenance of a "large cross" in a municipal park was "not alone sufficient to violate the test of 'excessive government entanglement.'" *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 347 (Or. 1976); *see also Port Auth.*, 760 F.3d at 245 (display of Ground Zero Cross did not create excessive entanglement).

III. THE MEMORIAL IS CONSTITUTIONAL UNDER ANY TEST ARTICULATED BY THIS COURT

None of the Establishment Clause tests articulated by this Court—whether *Van Orden*, *Lemon*, or *Town of Greece*—require the Commission to level or disfigure a nearly century-old war memorial acquired for traffic safety reasons, simply because the memorial uses a religious symbol. Indeed, although

the various tests articulated by this Court are framed differently, each emphasizes the role of religion in the Nation's history and looks primarily to the government's purposes for the display. This Court should grant certiorari to clarify that passive displays should be evaluated based on the Nation's historical traditions and the government's use of the symbol, not an amorphous inquiry into an "objective observer's" hypothesized reaction.

A. The Fourth Circuit's Decision Cannot Be Reconciled With *Van Orden*

In *Van Orden v. Perry*, this Court considered whether a Ten Commandments monument on the Texas State Capitol grounds violated the Establishment Clause. 545 U.S. 677 (2005). After holding that the *Lemon* test was "not useful in dealing with the sort of passive monument" at issue, a plurality of this Court looked instead to "the nature of the monument and [] our Nation's history." *Id.* at 686 (plurality opinion). The plurality found the Decalogue's "undeniable historical meaning" for the nation—highlighted by nearby monuments evoking national history—placed it in "the rich American tradition of religious acknowledgments" which do not violate the Establishment Clause. *Id.* at 690.

Justice Breyer issued an opinion concurring in the judgment, which lower courts have concluded is the "controlling opinion." *See, e.g.*, *Card*, 520 F.3d at 1017 n.10 (applying *Marks v. United States*, 430 U.S. 188 (1977)). Justice Breyer found "no test-related substitute for the exercise of legal judgment" in evaluating the monument. *Van Orden*, 545 U.S. at 700 (Breyer, J.). And he observed that although the "Commandments' text undeniably has a religious

message," "encourag[ing] disputes concerning the removal of longstanding depictions . . . from public buildings" would likely create the "religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.* at 700, 704. After examining the monument's history, context, and content, Justice Breyer concluded that the monument was constitutional. *Id.* at 703-05.

The Memorial here is materially indistinguishable from the monument in *Van Orden*.

First, as in *Van Orden*, "[t]he *circumstances surrounding* the [Commission's ownership of the Memorial] . . . suggest[s] that the State itself intended the . . . nonreligious aspects of the [Memorial's] message to predominate." *Id.* at 701 (Breyer, J.) (emphasis added). It is undisputed that the Commission's involvement with the Memorial is due only to roadway expansion plans and concerns of traffic safety. Pet. App. 56a-57a, 77a.

Second, the Memorial's "context suggests that the State intended the display's [nonreligious commemorative] message . . . to predominate." *Van Orden*, 545 U.S. at 702 (Breyer, J.). As in *Van Orden*, the seal of the Memorial's original builder—the American Legion—is prominently displayed in the center of the Memorial, and the Memorial has always contained a plaque that explains its commemorative purpose. Moreover, as in *Van Orden*, the Memorial is located near other monuments that "provide a context of history," *id.*, specifically commemoration of those who have died in the Nation's conflicts. And, as in *Van Orden*, the Memorial's location in the median of a busy traffic circle "suggests little or nothing of the

sacred," and certainly "does not readily lend itself to meditation or any other religious activity." *Id.*

Third, while 40 years passed before the *Van Orden* monument was challenged—a factor Justice Breyer found "determinative," *id.*—almost *90* years passed before the first complaint against the Memorial. "[T]hose [90] years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the [Memorial] as . . . a government effort" to endorse religion. *Id.* "[T]o reach a contrary conclusion here, based primarily on the religious nature of the [Memorial's cross-shape] would . . . lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions," and "create . . . religiously based divisiveness." *Id.*

B. The Memorial Satisfies The *Lemon*/ Endorsement/Reasonable Observer Test

The Fourth Circuit concluded that the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and modified by this Court in subsequent cases, controlled. Under *Lemon*, a challenged display must (1) "have a secular . . . purpose," (2) have a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) "not foster an excessive government entanglement with religion." *Id.* at 612-13 (internal quotation marks omitted). Moreover, in *Allegheny*, the Court modified the *Lemon* test by holding that a display will fail if it has "the purpose or effect of 'endorsing' religion," adopting a test first articulated in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984). 492 U.S. at 592. Here, the Fourth Circuit wrongly held that the

Memorial failed *Lemon*'s "effect" and "entanglement" prongs.

1. The Memorial Does Not Have The Primary Effect Of Endorsing Religion

A display "endorses" religion if it sends "a message to nonadherents that they are outsiders, not full members of the political community," or makes "a person's religious beliefs relevant to his or her standing in the political community." *Allegheny*, 492 U.S at 625, 627 (O'Connor, J., concurring) (internal quotation marks omitted). However, "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring). Nor does the "endorsement" test require courts to "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens." *Allegheny*, 492 U.S at 623 (O'Connor, J.).

The endorsement inquiry is instead a "collective standard to gauge the objective meaning of the government's statement in the community." *Pinette*, 515 U.S. at 779-80 (O'Connor, J.) (internal quotation marks and alterations omitted). Thus, evaluating whether a challenged display endorses religion "requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement." *Buono*, 559 U.S. at 720-21 (plurality opinion). This observer is far "more informed than the casual passerby," and is not "limited to the

information gleaned simply from viewing the challenged display," but is "aware of the history and context of the community and forum in which the religious display appears." *Pinette*, 515 U.S. at 779-80 (O'Connor, J.).

In short, the *Lemon*/endorsement/reasonable observer test asks whether, in light of the history and context of the display, a fully informed objective member of the community would conclude that the government intended to endorse religion. Here, no "reasonable observer" would reach such a conclusion.

First, and most simply, the reasonable observer would know the history of the Memorial, including that the Commission came to own the Memorial only because of traffic safety concerns, that the Commission has never expressed any religious motivation for its ownership or maintenance of the Memorial, and that the Memorial's private builders used a cross to mirror the gravemarkers under which their loved ones were buried in American battlefield cemeteries.

Second, the reasonable observer would know how the community has responded to the Memorial. He would know that in the near-century it has stood, the community has used the Memorial as a site for hundreds of events honoring veterans. By contrast, he would note only a single religious event that (may have) occurred at the Memorial in its 100-year history, hosted in 1931 by an out-of-town preacher—not a member of the community. Moreover, in the nearly 100 years it has stood, the community has responded to the Memorial by adding other secular commemorative monuments—and no religious monuments—around the memorial. Indeed, if, as this

Court has held, the central focus of the *Lemon*/endorsement/reasonable observer test is the message *the community* will take from the display, *see Pinette*, 515 U.S. at 779-80 (O'Connor, J.), there can be no more persuasive evidence than the fact that, in the nearly 100 years it has stood, the community has treated the Memorial as it would any other secular war monument.

Third, the reasonable observer would be aware of the various secular elements on the Memorial that explain its message—namely, the large plaque that identifies it as a memorial honoring 49 men who died in WWI, the military-themed words on the base, and the American Legion's symbol in the center of the cross. Thus, any reasonable observer who merely took the time to read the plaque on the Memorial would immediately understand that the Memorial was meant to convey a message of commemoration, not religious endorsement.

2. Spending Money For Grounds-keeping And Routine Maintenance Of A War Memorial Does Not "Entangle" Government With Religion

Nor is there any entanglement problem with the Commission's expenditure, over the course of six decades, of $117,000 to maintain the Memorial and grounds. As this Court has made clear, "'comprehensive, discriminating, and continuing state surveillance' [is] necessary to fall afoul of this [entanglement] standard." *Mueller v. Allen*, 463 U.S. 388, 403 (1983) (quoting *Lemon v. Kurtzman*, 403 U.S. at 619); *see also Agostini v. Felton*, 521 U.S. 203, 233-34 (1997) (program supporting parochial schools was not excessive entanglement where no "pervasive

monitoring by public authorities" of employees' religious conduct was required (citation omitted)).

Here, the Commission engaged only in routine upkeep of the Memorial, such as groundskeeping, lighting, and occasional repairs every few decades. *See* Pet. App. 59a-60a. And there is no evidence of any religious events at the Memorial since the Commission took ownership in 1961. As the District Court correctly held, this is not the stuff of entanglement.

C. The Memorial Is Constitutional Under The Test Applied In *Town of Greece*

In *Town of Greece v. Galloway*, this Court held that a town council's use of opening prayers did not violate the Establishment Clause. 134 S. Ct. 1811 (2014). Rather than apply *Lemon*, the Court applied the principles that "the Establishment Clause must be interpreted by reference to historical practices and understandings," and that so long as context shows the practice was not "exploited to proselytize or advance any one, or to disparage any other, faith or belief," the Establishment Clause is not offended. *Town of Greece*, 134 S. Ct. at 1817, 1819 (internal quotation marks omitted). Applying these principles, the Court concluded that legislative prayer was constitutional absent a "pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose" to coerce religious belief or practice. *Id.* at 1824.

Here, history supports the accepted use of crosses in passive war memorials to commemorate the fallen. As a plurality of this Court has observed, "a Latin cross is not merely a reaffirmation of Christian

beliefs," and "evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles . . . ." *Buono*, 559 U.S. at 721 (plurality opinion) (discussing a WWI memorial). Indeed, crosses have been a symbol of fallen soldiers in this country since at least the Civil War. *See Trunk*, 660 F.3d at 1100 (Bea, J., dissenting from denial of rehearing en banc) (noting at least 114 Civil War memorials incorporating crosses). And, as Congress observed in 1924, crosses were "peculiarly and inseparably associated" with the American lives lost in World War I. H.R. Res. 15, 68th Cong. at 1 (1924).

Moreover, the facts of this particular Memorial confirm that there is nothing coercive about the Commission's ownership and maintenance of the Memorial. To the contrary, the Fourth Circuit found that the government had "legitimate secular purposes" for maintaining the Memorial—honoring WWI veterans and preserving a historically significant war memorial. Pet. App. 16a. And it is difficult to see how a passive monument dedicated to men who died in WWI could be said to coerce religious belief or practice. "[O]ffense does not equate to coercion," *Town of Greece*, 134 S. Ct. at 1815, and, as Justice Kennedy has observed, "where the government's act of recognition or accommodation is passive and symbolic, . . . any intangible benefit to religion is unlikely to present a realistic risk of establishment." *Allegheny*, 492 U.S. at 662 (Kennedy, J.).

D. This Court Should Clarify That The Establishment Clause Is Not Offended By A Historical War Memorial Being Displayed By The Government For Secular Purposes

Any test adopted by this Court should distinguish between displays that are "a benign acknowledgment of religion's role in society," and those that instead "coerce [ ] citizens to support or participate in any religion or its exercise." *Town of Greece*, 134 S. Ct. at 1819, 1825 (internal quotation marks omitted). Unfortunately—as exemplified by the decision below—the tests articulated by the Court do a poor job of helping courts find this distinguishing line.

Nonetheless, despite their different articulations of the test, this Court's cases all emphasize the importance of historical tradition and an objective assessment of the government's reasons for putting up the display. Where a government's use of religious imagery has a historical foundation, and the challenged display reflects that tradition, this Court has tended to uphold the display. *See, e.g.*, *Van Orden*, 545 U.S. at 703 (Breyer, J.). In contrast, where the government instead uses a symbol to coerce religious belief or practice, the Court has found the display unconstitutional. *See, e.g.*, *McCreary County*, 545 U.S. at 870.

Thus, this Court should articulate a simple rule for constitutional challenges to passive displays: when a government uses religious imagery in a way that is consistent with "the rich American tradition of religious acknowledgments," *Van Orden*, 545 U.S. at 690 (plurality opinion), the display will be presumptively valid unless it is shown that the

government was not reflecting this tradition but was exploiting it to coerce or convert nonadherents.

Such a rule of decision has many things to commend it. It would fulfill the Establishment Clause's neutrality mandate by ensuring that displays are not condemned merely because the government chose to pursue secular goals with a symbol that can also have religious significance. It would also avoid "a hostility toward religion that has no place in our Establishment Clause traditions," *Van Orden*, 545 U.S. at 704 (Breyer, J.), by ensuring that monuments maintained to reflect history are not torn down out of a "brooding and pervasive devotion to the secular," *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring). And it would ensure that courts do not apply an overly broad interpretation of the Establishment Clause that would tend to mandate the type of religious discrimination prohibited by the Free Exercise Clause. *See Lee*, 505 U.S. at 598; *see also Masterpiece Cakeshop, Ltd. v. Colo. Human Rights Comm'n*, 584 U.S. ___, slip. op. at 17 (2018) (noting that "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion" (citation omitted)).

Moreover, a focus on the historical traditions of the Nation and whether a government uses a symbol to coerce nonadherents is most consistent with this Court's precedent—it explains the difference between the permissible display in *Van Orden* and the impermissible display in *McCreary*; it gives effect to the fully informed, reasonable observer called for by the Court's precedent, rather than the selectively informed, casual passer-by often employed by lower courts; and it fits comfortably within the Court's most

recent line of Establishment Clause cases, such as *Town of Greece*.

More specifically, such a test precludes false-positives—Establishment Clause "violations" caused by a misapplication of *Lemon's* "effect" prong—an error exemplified by the decision below. If, as the court below correctly found, the Memorial furthers the Commission's legitimate secular purposes of honoring veterans and preserving a historically significant war memorial, then it cannot possibly have an impermissible religious effect (unless these secular objectives are shown to be mere pretexts). Only an uninformed observer who misinterprets the message of the Memorial could wrongly attribute such a religion-advancing "effect" to the Memorial's legitimate secular history and purpose. Establishment Clause violations should not be based on the misperceptions of individuals who incorrectly see efforts at religious conversion where the government is pursuing secular objectives. The proposed analysis would foreclose such erroneous outcomes and avoid the divisive hostility toward religious symbolism that so often accompanies *Lemon*'s "effect" analysis.

The Memorial here clearly satisfies this proposed test. Religious symbols, including crosses, are a well-recognized, historically grounded method for solemnizing and commemorating those who have died, particularly in wartime (as legislative prayer in *Town of Greece* permissibly solemnized government proceedings). Thus, such a display would be presumptively constitutional, unless the plaintiffs can show that the particular display has been exploited to coerce religious belief or practice. And, applying that

test here, the objective circumstances confirm that the Commission maintains the Memorial to solemnize and honor men who died in WWI, rather than to coerce or convert nonadherents.

This Court should grant certiorari to clarify the standard for Establishment Clause challenges to passive displays, bring an end to the confused and divisive litigation that characterizes this area of law, and as Judge Wilkinson remarked, let the Memorial (and hundreds more like it, in Arlington and elsewhere) "remain and let those honored rest in peace." Pet. App. 96a.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari to the Fourth Circuit.

Respectfully submitted,

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JUNE 25, 2018

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2597

AMERICAN HUMANIST ASSOCIATION; STEVEN LOWE; FRED EDWORDS; BISHOP MCNEILL,

Plaintiffs – Appellants,

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Defendant – Appellee,

THE AMERICAN LEGION; THE AMERICAN LEGION DEPARTMENT OF MARYLAND; THE AMERICAN LEGION COLMAR MANOR POST 131,

Intervenors/Defendants – Appellees,

FREEDOM FROM RELIGION FOUNDATION; CENTER FOR INQUIRY,

Amici Supporting Appellant,

THE BECKETT FUND FOR RELIGIOUS LIBERTY; JOE MANCHIN; DOUG COLLINS; VICKY

HARTZLER; JODY HICE; EVAN JENKINS; JIM JORDAN; MARK MEADOWS; ALEX MOONEY; STATE OF WEST VIRGINIA; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF HAWAII; STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS; STATE OF KENTUCKY; STATE OF LOUISIANA; STATE OF MICHIGAN; STATE OF MONTANA; STATE OF NEVADA; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF RHODE ISLAND; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TEXAS; STATE OF UTAH; STATE OF VIRGINIA; STATE OF WISCONSIN,

Amici Supporting Appellee.

Appeal from the United States District Court of Maryland, at Greenbelt. Deborah K. Chasanow, Senior District Judge. (8:14-cv-00550-DKC)

ARGUED: December 7, 2016

Decided: October 18, 2017

Before GREGORY, Chief Judge, and WYNN and THACKER, Circuit Judges.

Reversed and remanded by published opinion. Judge Thacker wrote the opinion, which Judge Wynn joined. Chief Judge Gregory wrote an opinion concurring in part and dissenting in part.

THACKER, Circuit Judge:

In this case we are called upon to decide whether the Establishment Clause is violated when a local government displays and maintains on public property a 40-foot tall Latin cross, established in memory of soldiers who died in World War I. The district court determined that such government action does not run afoul of the Establishment Clause because the cross has a secular purpose, it neither advances nor inhibits religion, and it does not have the primary effect of endorsing religion.

We disagree. The monument here has the primary effect of endorsing religion and excessively entangles the government in religion. The Latin cross is the core symbol of Christianity. And here, it is 40 feet tall; prominently displayed in the center of one of the busiest intersections in Prince George's County, Maryland; and maintained with thousands of dollars in government funds. Therefore, we hold that the purported war memorial breaches the "wall of separation between Church and State." *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (internal quotation marks omitted). Accordingly, we reverse and remand.

I.

A.

In 1918, some Prince George's County citizens started raising money to construct a giant cross, in addition to a previously established plaque, to honor 49 World War I soldiers from the county. The private organizers required each donor to sign a pledge sheet recognizing the existence of one god. It stated:

> WE, THE CITIZENS OF MARYLAND, *TRUSTING IN GOD, THE SUPREME RULER*

> *OF THE UNIVERSE*, PLEDGE FAITH IN OUR BROTHERS WHO GAVE THEIR ALL IN THE WORLD WAR TO MAKE THE WORLD SAFE FOR DEMOCRACY. THEIR MORTAL BODIES HAVE TURNED TO DUST, BUT THEIR SPIRIT LIVES TO GUIDE US THROUGH LIFE IN THE WAY OF *GODLINESS*, JUSTICE, AND LIBERTY.
>
> WITH OUR MOTTO, "*ONE GOD*, ONE COUNTRY AND ONE FLAG," WE CONTRIBUTE TO THIS MEMORIAL CROSS COMMEMORATING THE MEMORY OF THOSE WHO HAVE NOT DIED IN VAIN.

J.A. 1168 (emphasis supplied).[1] Local media described the proposed monument as a "mammoth cross, a likeness of the Cross of Calvary, as described in the Bible."[2] *Id.* at 1115. The private organizers held a groundbreaking ceremony on September 28, 1919, at which time the city of Bladensburg owned the land.

In 1922, the private organizers ran out of money and could not finish the project. So, the Snyder-Farmer Post of the American Legion (the "Post") assumed responsibility. At its initial fundraising drive, the Post had a Christian prayer-led invocation. Later that same year, on Memorial Day, the Post held memorial services around the unfinished monument, at which a Christian chaplain led prayer, and those in attendance

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[1] Citations to the "J.A." or "Supp. J.A." refer to the Joint Appendix and Supplemental Joint Appendix, respectively, filed by the parties in this appeal.

[2] "Calvary" refers to the "proper name of the place where [Jesus] Christ was crucified." J.A. 289.

sang the Christian hymn "Nearer My God to Thee." J.A. 2096. The Post ultimately completed the monument in 1925 and had Christian prayer services at the dedication ceremony, during which only Christian chaplains took part. No other religions were represented.

Upon completion, the monument at issue stood four stories tall in the shape of a Latin cross located in the median of a three-way highway intersection in Bladensburg, Maryland (the "Cross"). Over the years, memorial services continued to occur on a regular basis at the Cross, and those services often included prayer at invocations and benedictions, and speaker-led prayers. Sunday worship services have at times been held at the Cross. Nothing in the record indicates that any of these services represented any faith other than Christianity.

On March 1, 1961, Appellee Maryland-National Capital Park and Planning Commission (the "Commission"), a state entity, obtained title to the Cross and the land on which it sits. According to the Commission, it acquired the Cross and land in part because of safety concerns arising from the placement of the Cross in the middle of a busy traffic median. Therefore, the Commission purports that it assumed responsibility to "maintain[], repair[], and otherwise car[e] for" the Cross. J.A. 2529. The Commission has since spent approximately $117,000 to maintain and repair the Cross, and in 2008, it set aside an additional $100,000 for renovations.

B.

Today, the 40-foot tall Cross is situated on a traffic island taking up one-third of an acre at the busy

intersection of Maryland Route 450 and U.S. Route 1 in Bladensburg. The American Legion's symbol -- a small star inscribed with "U.S." -- is affixed near the top of the Cross, and an American flag flies in the vicinity of the Cross. The Cross sits on a rectangular base, with each side inscribed with one of four words: "valor," "endurance," "courage," and "devotion." J.A. 1963 (capitalization omitted). Additionally, one side of the base contains a two-foot tall, nine-foot wide plaque listing the names of the 49 soldiers from Prince George's County whom the Cross memorializes, followed by a quote by President Woodrow Wilson.[3] However, the plaque is located on only one side of the base, which bushes have historically obscured.[4] Moreover, the plaque is badly weathered, rendering it largely illegible to passing motorists.

The Cross is part of a memorial park honoring veterans in Bladensburg (the "Veterans Memorial Park"). A small sign titled "Star-Spangled Banner National Historical Trail" is located on a walking path approximately 600 feet north of the Cross. This small sign -- which, like the plaque at the base of the Cross, is not readily visible from the highway -- serves as the only formal marker identifying the area as a memorial park by stating, "This crossroads has become a place

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[3] "The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives." J.A. 1891.

[4] The bushes were removed in response to the filing of this action in an attempt to accommodate Appellants' requests. *See* Oral Argument at 26:50–27:00, *Am. Humanist Assoc. v. Maryland-Nat'l Capital Park & Planning Comm'n*, No. 15-2597, http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments (Dec. 7, 2016).

for communities to commemorate their residents in service and in death." J.A. 1870. The other monuments in the memorial park area include a War of 1812 memorial, a World War II memorial, a Korean and Vietnam veterans memorial, and a September 11th memorial walkway. These surrounding monuments are each located at least 200 feet away from the Cross, with the War of 1812 memorial located one-half mile away. No other monument in the area is taller than ten feet, and there are no other religious symbols in the park.

Beyond the above description of the Cross and its placement in the park, various photographs from the record depicting the Cross are attached to this opinion. *See* J.A. 34 (image of the Cross before this case was filed), 1098 (closer image of the Cross), 1891 (image of the weathered plaque at the base of the Cross); Supp. J.A. 2 (overhead image of the Veterans Memorial Park).

II.

Appellants Steven Lowe, Fred Edwords, and Bishop McNeill are non-Christian residents of Prince George's County who have faced multiple instances of unwelcome contact with the Cross. Specifically, as residents they have each regularly encountered the Cross while driving in the area, believe the display of the Cross amounts to governmental affiliation with Christianity, are offended by the prominent government display of the Cross, and wish to have no further contact with it. Per their complaint, they believe "a more fitting symbol of [veterans'] sacrifice would be a symbol of the Nation for which they fought and died, not a particular religion." J.A. 25. Appellant

American Humanist Association ("AHA") is a nonprofit organization that advocates to uphold the founding principle of separation of church and state. AHA is suing on behalf of its members.[5]

As noted, Appellee Commission, a state entity, owns and maintains the Cross and the traffic island on which it stands. Appellees-Intervenors are the American Legion, the American Legion Department of Maryland, and the American Legion Colmar Manor Post 131 (collectively, "the Legion").[6] The Legion is a private organization focused on "Americanism" and the armed forces. J.A. 1469.

Appellants sued the Commission under 42 U.S.C. § 1983, alleging the Commission's display and maintenance of the Cross violates the Establishment Clause. Appellants seek a declaratory judgment that this conduct violates the Establishment Clause and Appellants' constitutional rights, an injunction enjoining the Commission from displaying the Cross on public property,[7] nominal damages, and attorney's fees and costs.

Appellants and Appellees filed cross-motions for summary judgment, and the district court granted summary judgment to Appellees. In doing so, the district court analyzed Appellants' claim pursuant to

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[5] Where appropriate, Appellants AHA, Lowe, Edwords, and McNeill are collectively referred to as "Appellants."

[6] Where appropriate, the Commission and Legion are collectively referred to as "Appellees."

[7] Appellants later clarified their desired injunctive relief as removal or demolition of the Cross, or removal of the arms from the Cross "to form a non-religious slab or obelisk." J.A. 131.

Lemon v. Kurtzman, 403 U.S. 602 (1971). It held the Commission owned the Cross and land for a legitimate secular reason, that is, to maintain the highway median. The district court also identified a second secular purpose, which is to commemorate the 49 World War I soldiers from Prince George's County.[8]

The district court next determined that the Cross neither advanced nor inhibited religion because (1) the Cross has been primarily used for veterans' events; (2) crosses are generally regarded as commemorative symbols for World War I, at least overseas; (3) secular war memorials surround the Cross; and (4) the Cross has secular attributes, such as the Legion symbol on the face of the Cross. Finally, the district court concluded the Commission's display and maintenance of the Cross did not amount to excessive entanglement with religion because the Cross was not a governmental endorsement of religion. At bottom, the district court viewed the Commission's maintenance of the Cross as relating to traffic safety and veteran commemoration rather than religion. Appellants timely appealed.

III.

We review de novo a district court's grant of summary judgment. *See Elderberry of Weber City, LLC v. Living Centers-Se., Inc.*, 794 F.3d 406, 411 (4th Cir. 2015). "In doing so, we apply the same legal standards as the district court, and view all facts in the light most favorable to the nonmoving party." *Certain Underwriters at Lloyd's, London v. Cohen*, 785

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[8] Alternatively, the district court applied *Van Orden v. Perry*, 545 U.S. 677 (2005), and reached the same conclusion.

F.3d 886, 889 (4th Cir. 2015) (alterations and internal quotation marks omitted).

IV.

Appellants contend that the Cross is a war memorial that favors Christians to the exclusion of all other religions. In response, Appellees frame Appellants' claim as promoting a strict rule that crosses on government property are per se unconstitutional, which they assert threatens memorials across the Nation.

A.

As an initial matter, Appellees question whether Appellants have standing to bring this claim. They argue that Appellants have not "forgone any legal rights," such as "the right to drive on the public highways running through [the] Veterans Memorial Park" "to avoid contact with the memorial." Appellees' Br. 46 n.12. Appellees' standing argument lacks merit.

An Establishment Clause claim is justiciable even when plaintiffs claim noneconomic or intangible injury. *See Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997); *see also Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 582 (4th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017). Specifically, in religious display cases, "unwelcome direct contact with a religious display that appears to be endorsed by the state" is a sufficient injury to satisfy the standing inquiry. *Suhre*, 131 F.3d at 1086.

The non-AHA Appellants have standing because they allege specific unwelcome direct contact with the Cross; that is, they have each regularly encountered the Cross as residents while driving in the area, the

Commission caused such injury by displaying the Cross, and the relief sought -- enjoining the display of the Cross -- would redress their injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *see also ACLU v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1983) (determining one plaintiff had standing because a Latin cross was clearly visible from "the porch of his summer cabin" and from the roadway he used to reach the cabin). The AHA also has standing. An association has standing to sue on behalf of its members if they would have standing to sue on their own, the association seeks to protect interests germane to its purpose, and neither the claim asserted nor the relief requested requires its individual members to participate in the lawsuit. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 429 (6th Cir. 2011). Here, the AHA has members in Prince George's County who have faced unwelcome contact with the Cross. These interests are germane to the AHA's purpose of maintaining the separation of church and state, and the claim and relief sought do not require individual participation. Appellants thus have standing to sue, and so we turn to the merits of this case.

B.

The Establishment Clause provides, "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. This clause thus guarantees religious liberty and equality to people of all faiths. *See Cty. of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989), *abrogated on other grounds, Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

We have generally analyzed Establishment Clause issues pursuant to *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Buxton v. Kurtinitis*, 862 F.3d 423, 432 (4th Cir. 2017); *Lambeth v. Bd. of Comm'rs of Davidson Cty.*, 407 F.3d 266, 268 (4th Cir. 2005); *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003). Per *Lemon*, to comply with the Establishment Clause, a challenged government display must (1) have a secular purpose; (2) not have a "principal or primary effect" that advances, inhibits, or endorses religion; and (3) not foster "an excessive entanglement between government and religion." *Lambeth*, 407 F.3d at 269–73 (internal quotation marks omitted); see *Lemon*, 403 U.S. at 612–13. "If a state action violates even one of these three prongs, that state action is unconstitutional." *Koenick v. Felton*, 190 F.3d 259, 265 (4th Cir. 1999) (citing *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1147 (4th Cir. 1991)); *see also Buxton*, 862 F.3d at 432.

However, Appellees dispute *Lemon's* application here, arguing that, instead, the Supreme Court's holding in *Van Orden v. Perry*, 545 U.S. 677 (2005), controls. In *Van Orden*, the Court addressed whether a monument displaying the Ten Commandments on government property violated the Establishment Clause. *See* 545 U.S. at 681. The monument, located between the Texas Capitol and the Texas Supreme Court building, also displayed an eagle grasping the American flag, two Stars of David, Greek letters representing Christ, and an inscription indicating that a private organization donated the monument. *See id.* at 681–82. The monument stood six-feet high and three-and-a-half feet wide, and sat among "17 monuments and 21 historical markers

commemorating the people, ideals, and events that compose Texan identity," *id.* at 681 (internal quotation marks omitted), such as monuments of the Heroes of the Alamo, the Texas National Guard, and the Texas Peace Officers, *see id.* at 681 n.1.

A plurality of the Court first decided the *Lemon* test is "not useful" in the "passive" monument context. *Van Orden*, 545 U.S. at 686. Rather, it examined the role and historical meanings of God and the Ten Commandments in our Nation's history. *See id.* at 686–91. The plurality first noted President George Washington's Thanksgiving Day Proclamation of 1789, which "directly attributed to the Supreme Being the foundations and successes of our young Nation," as an example of the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Id.* at 686–87 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)). It also recognized "the role of God in our Nation's heritage," pointing to other Ten Commandment displays in federal buildings, including the Supreme Court's own courtroom and the Library of Congress, which reinforced the secular connection between our Nation and the Ten Commandments. *See id.* at 687–89. Though the Ten Commandments have religious significance, the plurality noted that the Ten Commandments were given to Moses, who "was a lawgiver as well as a religious leader." *Id.* at 690. Finally, the plurality viewed the placement of the monument on the Texas State Capitol grounds as "far more passive" when compared to other display cases, especially because the petitioner in *Van Orden* "walked by the monument for a number of years" before suing. *Id.* at 691. Taking

all of these considerations as a whole, the plurality concluded that the display in *Van Orden* did not violate the Establishment Clause.

Justice Breyer's concurrence, however, is controlling because it is the narrowest ground upholding the majority. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 236 (4th Cir. 2002); *see also Card v. City of Everett*, 520 F.3d 1009, 1017 n.10 (9th Cir. 2008) (noting Justice Breyer's concurrence controls); *Staley v. Harris Co.*, 485 F.3d 305, 308 n.1 (5th Cir. 2007) (same); *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 49 (2d Cir. 2011) (same); *ACLU v. Grayson Co.*, 591 F.3d 837, 847 (6th Cir. 2010) (applying *Van Orden* and relying primarily on Justice Breyer's concurrence). The concurrence explains that courts should remain faithful to the "basic purposes" of the Establishment Clause by examining, for example, the circumstances surrounding the monument's placement, its physical setting, and the length of time it remains unchallenged. *Van Orden*, 545 U.S. at 698, 700–03 (Breyer, J., concurring). In addition, however, Justice Breyer clarified that the *Lemon* test continues to act as a "useful guidepost[]" in Establishment Clause cases involving monuments with both secular and sectarian meanings. *Id.* at 700. The controlling *Van Orden* decision thus did not overrule *Lemon*; to the contrary, Justice Breyer actually recognized *Lemon* as a "more formal Establishment Clause test[]." *Id.* at 703. And this court has consistently applied *Lemon* in religious display cases. *See, e.g., Lambeth*, 507 F.3d at 268–69; *Smith v. Cty. of Albemarle*, 895 F.2d 953, 958 (4th Cir.

1990). Thus, we see fit to apply *Lemon* in this case, with due consideration given to the *Van Orden* factors.

C.

For their part, Appellees assert *Van Orden* "dictates the outcome of this case," and there is no Establishment Clause violation because (1) the Commission's involvement relates to highway safety; (2) memorials surrounding the Cross commemorate veterans; and (3) the Cross has stood unchallenged for 90 years. Appellees' Br. 21. But even under *Lemon*, Appellees contend that they prevail, particularly because the Cross's "content, setting, and history make clear to a reasonable objective observer that its primary effect is commemoration, not religious endorsement." *Id.* at 22. Therefore, Appellees argue that they prevail regardless of whether *Van Orden* or *Lemon* applies.

In support of their argument to the contrary, Appellants primarily rely on *Lemon's* second prong -- that is, the "effect of advancing religion." Appellants highlight the Latin cross's inherent religious message, the history of religious activity involving the Cross, the Cross's size and prominence, and its limited secular features. Appellants alternatively assert that the Cross is unconstitutional under *Van Orden* because the Latin cross lacks any connection to our Nation's history, and the Cross's physical setting undermines the Establishment Clause.

As explained above, we analyze this case pursuant to the three-prong test in *Lemon* with due consideration given to the factors outlined in *Van Orden*, mindful that a violation of even one prong of

Lemon results in a violation of the Establishment Clause.

1.

Secular Purpose

Demonstrating a legitimate secular purpose is "a fairly low hurdle." *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001) (internal quotation marks omitted). Moreover, government action having "dual legitimate purposes" -- one secular and one sectarian -- "cannot run afoul of the first *Lemon* prong." *Id.* at 277.

The Commission has articulated legitimate secular purposes for displaying and maintaining the Cross that satisfy the first prong of *Lemon*. *See Lynch*, 465 U.S. at 680–81. The Commission obtained the Cross for a secular reason -- maintenance of safety near a busy highway intersection. The Commission also preserves the memorial to honor World War I soldiers. Government preservation of a significant war memorial is a legitimate secular purpose. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1108 (9th Cir. 2011). Thus, the Commission has satisfied the first prong of *Lemon*.

2.

Effect

The second prong of *Lemon* requires this court to ask "whether a particular display, with religious content, would cause a reasonable observer to fairly understand it in its particular setting as impermissibly advancing or endorsing religion." *Lambeth*, 407 F.3d at 271. A "reasonable observer in the endorsement inquiry must be deemed aware of the

history and context of the community and forum in which the religious speech takes place." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (alterations omitted) (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring)). "Put differently, the effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval of religion." *Mellen*, 327 F.3d at 374 (alterations and internal quotation marks omitted). This second prong therefore requires a detailed factual analysis of the Cross, including its meaning, history, and secularizing elements, and, where relevant, we consider the appropriate factors under *Van Orden*. *See Trunk*, 629 F.3d at 1110.

a.

Meaning of the Latin Cross

The Latin cross is the "preeminent symbol of Christianity." *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004) (internal quotation marks omitted); *see Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995); *Gonzales v. N. Twp. of Lake Cty.*, 4 F.3d 1412, 1418 (7th Cir. 1993); *Murray v. City of Austin*, 947 F.2d 147, 149 (5th Cir. 1991); *ACLU v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 (11th Cir. 1983). Indeed, the Latin cross is "exclusively a Christian symbol, and not a symbol of any other religion." *Trunk*, 629 F.3d at 1111 (internal quotation marks omitted); *see Buono*, 371 F.3d at 545; *Gonzales*, 4 F.3d at 1418 ("[W]e are masters of the obvious, and we know that the crucifix is a Christian symbol."). Notwithstanding the Latin cross's inherent religious

meaning, the district court concluded that it is also a symbol of World War I, particularly overseas. Specifically, the district court concluded that the Cross at issue here evokes the image of white crosses on foreign battle fields. For this proposition it cites the Legion's expert witness report, which states that "the symbolism of the cross is that of individual loss of life, not of the Resurrection [of Jesus Christ]." J.A. 1898.

While the Latin cross may generally serve as a symbol of death and memorialization, it only holds value as a symbol of death and resurrection because of its affiliation with the crucifixion of Jesus Christ. *See Carpenter v. City and Cty. of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996) ("The Latin cross is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity" (internal quotation marks omitted)); *ACLU v. City of St. Charles*, 794 F.2d 265, 273 (7th Cir. 1986) ("It is the principal symbol of the Christian religion, recalling the crucifixion of Jesus Christ and the redeeming benefits of his passion and death" (internal quotation marks omitted)). One simply cannot ignore the fact that for thousands of years the Latin cross has represented Christianity. Even in the memorial context, a Latin cross serves not simply as a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ.[9] Further, even if other

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[9] The argument could be made that to hold that the Latin cross symbolizes anything other than Christianity may be deemed offensive to Christians. The Latin cross "reminds Christians of Christ's sacrifice for His people," and "it is unequivocally a symbol

countries may identify the Latin cross as a commemorative symbol of World War I, that acknowledgment does not dictate our analysis. Indeed, crosses used on World War I battlefields were *individual* -- rather than universal -- memorials to the lives of Christian soldiers.[10] And this Nation, unlike others, maintains a clearly defined wall between church and state that "must be kept high and impregnable." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). Thus, the manner in which other countries view the Latin cross is of no moment.

Further, a Latin cross differs from other religious monuments, such as the Ten Commandments or the motto "In God We Trust." Those symbols are well known as being tied to our Nation's history and government, and courts have thus upheld their public

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of the Christian faith." *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1022 (10th Cir. 2008).

[10] The poppy has actually been known as a universal symbol for commemorating World War I. *See Trunk*, 629 F.3d at 1113; *Eang L. Ngov, Selling Land and Religion*, 61 U. Kan. L. Rev. 1, 28 (2012) ("The poppy, as depicted in the famous poem In Flanders Fields, not the cross, became the universal symbol in the United States and abroad for the foreign wars" (footnotes omitted)); *The Cambridge Encyclopedia* 877 (6th ed. 2006) ("Red poppies, which grew wild in the fields of Flanders, are used in November as a symbol of remembrance of those who died in the two World Wars"); *see generally* H.R. Rep. No. 80-2071 (discussing the use of the poppy to memorialize World War I and reporting favorably on commemorative stamps depicting the poppy); Ryan Valentin, *Milk and Other Intoxicating Choices: Official State Symbol Adoption*, 41 N. Ky. L. Rev. 1, 5–6 (2014); Jennifer Iles, *In Remembrance: The Flanders Poppy*, 13 Mortality 201 (2008) (discussing the history of the poppy and its status as a symbol of remembrance).

display. *See, e.g., Van Orden*, 545 U.S. at 688 (noting the secular role of the Ten Commandments in American history); *Lambeth*, 407 F.3d at 271–72 (acknowledging the ties between American history and the motto "In God We Trust"). Appellees have not sufficiently demonstrated that the Latin cross has a similar connection.

b.

History of the Cross

Though the history of the Latin cross favors Appellants, the history of the particular Cross before us does not clearly support one party over the other. On the one hand, the initial donors to the memorial fund signed a pledge professing a belief in God, and the Cross has been the scene of Christian activities, such as Sunday worship services and group prayer at invocations and benedictions. On the other hand, private organizations raised money to erect the Cross, it has a scattered history of religious use, and it has primarily hosted veteran-focused ceremonies. Thus, when viewed through the lens of not only *Lemon*, but also of *Van Orden*, the circumstances surrounding the Cross's placement admittedly point to a semisecular history. *See Van Orden*, 545 U.S. at 701.

It is also true that the Cross has stood unchallenged for 90 years, which Appellees argue reinforces its secular effect. *See Van Orden*, 545 U.S. at 702. But that argument is too simplistic. In this case, it cannot be said that "the longer the violation, the less violative it becomes." *Gonzales*, 4 F.3d at 1422 (rejecting the argument that nearly 40 years without challenging a

crucifix reinforced its secular effect).[11] Perhaps the longer a violation persists, the greater the affront to those offended. The Cross's history therefore does not definitively aid either side in the analysis

c.

Secular Elements

Admittedly, the Cross contains a few secular elements. As support for their position, Appellees point to the plaque at the base of the Cross that contains the names of the 49 soldiers from Prince George's County whose lives were lost in World War I; the Legion symbol; the words "valor," "endurance," "courage," and "devotion" inscribed on its base; an American flag flying in its vicinity; and its location in the Veterans Memorial Park. Appellees maintain that

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[11] Of note, a person who dared bring a challenge to the Cross for much of those 90 years would have faced possible rebuke. For example, atheists were forbidden from holding public office until the Supreme Court's intervention in the 1960's. In 1959, the Governor of Maryland appointed Roy Torcaso as a Notary Public, but the Secretary of State of Maryland refused to issue the commission because Torcaso, an atheist, would not declare a belief in the existence of god. *See* Appellant's Br. 4; *Torcaso v. Watkins*, 367 U.S. 488 (1961). The Maryland Constitution provides, "No religious test ought to be required as a qualification for any office of profit or trust in this state other than a declaration of belief in the existence of God." The Supreme Court deemed the clause unconstitutional declaring that Maryland had "set[] up a religious test which was designed to and, if valid, does bar every person who refuses to declare a belief in God from a public office of profit or trust in Maryland." *Torcaso*, 367 U.S. at 489 (internal quotation marks omitted). More than 50 years later, the constitution still contains the offending provision. *See* Md. Const. Decl. of Rts. art. 37.

the plaque and symbols diminish any government endorsement of religion.

But the sectarian elements easily overwhelm the secular ones. The Cross is by far the most prominent monument in the area, conspicuously displayed at a busy intersection, standing four stories tall, and overshadowing the other monuments, the tallest of which is only ten feet tall and located approximately 200 feet from the Cross. The other monuments composing the Veterans Memorial Park are anywhere from 200 feet away to a half-mile away. The immense size and prominence of the Cross necessarily "evokes a message of aggrandizement and universalization of religion, and not the message of individual memorialization and remembrance that is presented by a field of gravestones." *Trunk*, 629 F.3d at 1116 n.18 (citation omitted).

In addition, the Cross is not located in an area where one could easily park, walk to the Cross, and examine the plaque.[12] Rather, the Cross is located in a high-traffic area, and passers-by would likely be

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[12] Although there may be parking available in the vicinity of the Cross, as well as a walkway to the Cross, realistically, the general public may not easily or readily access the Cross. In fact, Appellees admitted at oral argument that pedestrians attending ceremonies held at the Cross accessed the site primarily with help from police officers guiding pedestrians through the intersection and highway. *See* Oral Argument at 25:00–26:30, *Am. Humanist Assoc. v. Maryland-Nat'l Capital Park & Planning Comm'n*, No. 15-2597, http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments (Dec. 7, 2016). And, after all, the primary reason the Commission took over the maintenance of the Cross was for safety reasons, given its location in the middle of a busy highway intersection.

unable to read the plaque, particularly given its location on only one side of the Cross,[13] and the fact that both the plaque and the American Legion symbol are badly weathered, not to mention that the American Legion symbol is small in comparison to the overall size of the Cross. We also cannot ignore the American Legion's affiliation with Christianity, as gleaned from its prayer manuals and the "Four Pillars of the American Legion." J.A. 1469.[14] And, when we consider the physical setting of the Cross pursuant to *Van Orden*, Appellees' arguments are equally unavailing. *See* 545 U.S. at 702. The Cross's location on public property at a busy traffic intersection, the small size and scattered locations of the surrounding monuments, plus the fact that bushes have obscured the plaque for much of its history, *see, e.g.*, J.A. 34 (photograph of the Cross before this case was filed), all point to a violative display. *See Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1121 (10th Cir. 2010) ("The fact that the [12-foot tall] cross includes biographical information about [a] fallen trooper does not diminish the governmental message endorsing Christianity.

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[13] The plaque's location on one side of the Cross makes it visible, if at all, only to those traveling on a small portion of the busy highway. *See* J.A. 1891 (photograph of the weathered plaque); *see also* Appendix (attached).

[14] For example, to the exclusion of other religions, each Legion chapter has a chaplain, and the Legion has a Christian prayer manual that is used at meetings, invocations, and benedictions. Further, pursuant to the "Four Pillars of the American Legion," the Legion opposes attacks on "patriotic" values. J.A. 1469. Such attacks include prayer being "removed from schools," "[r]eferences to God [being] challenged," and attacks on the "institution of marriage." *Id.* at 1469–70.

This is especially true because a motorist driving by one of the memorial crosses at 55-plus miles per hour may not notice, and certainly would not focus on, the biographical information.").

Thus, we conclude that the historical meaning and physical setting of the Cross overshadows its secular elements. Other courts presented with similar situations have concluded likewise. *See, e.g., Trunk*, 629 F.3d at 1123 (concluding a 43-foot Latin cross, though purporting to serve as a war memorial, overshadowed its secular aspects, which included a plaque and 2,100 commemorative bricks); *Gonzales*, 4 F.3d at 1422–23 (determining that an 18-foot wooden crucifix advanced religion, despite containing a plaque dedicating it to veterans, because the plaque was obscured); *Smith*, 895 F.2d at 958 (concluding a crèche[15] on government property violated the Establishment Clause in part because a plaque stating its private sponsorship was "relatively small . . . in relation to the whole" display, thus "mitigat[ing] [the plaque's] value").

According to the dissent, our analysis bases the unconstitutionality of the Cross "predominantly on the size of the cross," without fairly weighing its "appearance, context, and factual background." *Post* at 42 (emphasis omitted). This is not accurate. Although we are of the opinion that the size of a religious display does matter, we have also carefully considered the other factors required by *Lemon* and

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[15] A crèche is "a visual representation of the scene in the manger in Bethlehem shortly after the birth of Jesus, as described in the Gospels of Luke and Matthew." *Cty. of Allegheny*, 492 U.S. at 580 (footnote omitted).

Van Orden. *See* Part IV.C.2.a (analyzing context and meaning); Part IV.C.2.b (factual background and history); Part IV.C.2.c (appearance). We are confident that we have fully complied with our "constitutional directive." *Post* at 42.

d.

Reasonable Observer

Considering the factors above, we conclude that a reasonable observer would fairly understand the Cross to have the primary effect of endorsing religion. We do not disagree with the dissent's characterization of the "reasonable observer" as someone who is not just an "ordinary individual" but "aware of the history and context of the community and forum in which the religious display appears." *Post* at 43–44 (internal quotation marks omitted); *see Lambeth*, 407 F.3d at 271–72 (quoting *Good News Club*, 533 U.S. at 119 (citation omitted)). In fact, Appellees at oral argument reaffirmed that the reasonable observer is aware of the entire context and history of the Cross, spanning from its origin to the present. *See* Oral Argument at 18:04–19:00, *Am. Humanist Assoc. v. Maryland-Nat'l Capital Park & Planning Comm'n*, No. 15-2597, http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments (Dec. 7, 2016).

Accordingly, a reasonable observer would know that the Cross is dedicated to 49 World War I veterans and that veteran services occur at the Cross. But, more importantly, a reasonable observer would also know that the private organizers pledged devotion to faith in God, and that same observer knows that Christian-only religious activities have taken place at the Cross. No party has come forward with any evidence to the

contrary. Although the reasonable observer may recognize that the Cross is located in the Veterans Memorial Park, such reasonable observer also could not help but note that the Cross is the most prominent monument in the Park and the only one displaying a religious symbol. Further, the reasonable observer would know that a Latin cross generally represents Christianity. These factors collectively weigh in favor of concluding that the Cross endorses Christianity -- not only above all other faiths, but also to their exclusion.

The Commission and supporting amici equate the Cross to the crosses in Arlington National Cemetery and similar locations. They raise concerns that siding with Appellants here would jeopardize other memorials across the Nation displaying crosses, laying waste to such memorials nationwide. Any such concern is misplaced. Establishment Clause cases are fact-specific, and our decision is confined to the unique facts at hand. *See McCreary Cty. v. ACLU*, 545 U.S. 844, 867–68 (2005) (recognizing the relevant inquiry is based on the specific facts before the Court); *Van Orden*, 545 U.S. at 700 (acknowledging the "fact-intensive" nature of religious display cases); *Card*, 520 F.3d at 1014; *Staley*, 485 F.3d at 309; *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005).

In any event, Arlington National Cemetery is a designated area for commemorating and memorializing veterans who have passed away.[16] The

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[16] It must be made clear that we are not deciding or passing judgment on the constitutionality of Arlington National Cemetery's display of Latin crosses. Rather, we are merely

crosses there are much smaller than the 40-foot tall monolith at issue here. And, significantly, Arlington National Cemetery displays diverse religious symbols, both as monuments and on individual headstones.[17] Contrast that with the Cross here. There are no other religious symbols present on the Cross or in the entirety of the Veterans Memorial Park. Christianity is singularly -- and overwhelmingly -- represented. Therefore, the second prong of *Lemon* is violated.

3.

Excessive Entanglement

We turn now to the third prong of the *Lemon* test -- whether the government display creates "an excessive entanglement between government and religion." *Lambeth*, 407 F.3d at 272–73 (internal quotation marks omitted). Excessive entanglement with religion "is a question of kind and degree." *Lynch*, 465 U.S. at 684. Such entanglement may include "pervasive monitoring or other maintenance by public authorities." *Lambeth*, 407 F.3d at 273 (citations omitted). Spending public funds, though a factor in the analysis, is not necessary for a plaintiff to satisfy the entanglement prong. *See Constangy*, 947 F.2d at 1152. Indeed, excessive entanglement may lie simply where the government's entanglement has the effect of advancing or inhibiting religion. *See Agostini v. Felton*, 521 U.S. 203, 232–33 (1997).

We hold there is excessive religious entanglement in this case for two reasons. First, the Commission owns

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distinguishing the facts at hand from those displayed at other places of commemoration.

[17] Images of such headstones are attached in the appendix.

and maintains the Cross, which is displayed on government property. The Commission has spent at least $117,000 to maintain the Cross and has set aside an additional $100,000 for restoration. Other cases holding that displays violate the Establishment Clause have involved de minimis government spending, if any. *See Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring) ("[A]ny use of public funds to promote religious doctrines violates the Establishment Clause." (emphasis omitted)).[18] Second, displaying the Cross, particularly given its size, history, and context, amounts to excessive entanglement because the Commission is displaying the hallmark symbol of Christianity in a manner that dominates its surroundings and not only overwhelms all other monuments at the park, but also excludes all other religious tenets. The display aggrandizes the Latin cross in a manner that says to any reasonable observer that the Commission either places Christianity above other faiths, views being American and Christian as one in the same, or both. Therefore, the third prong of *Lemon* is also violated. We note, however, that because the Cross is unconstitutional under the effect prong, the excessive entanglement prong here merely provides an alternative indicator of the Cross's unconstitutionality.

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[18] The dissent's view to the contrary is only based on its differing views of the Cross -- as a "historical monument" rather than promotion of a religious doctrine in the form of a religious symbol. *Post* at 48. For the reasons explained *supra*, the Cross embodies promotion of a religious doctrine, Christianity, and therefore, Justice O'Connor's statement is directly applicable.

4.

Conclusion

The Commission's display of the Cross fails the second and third prongs of *Lemon*, and the *Van Orden* factors are unsupportive of Appellees' position in this case. The display and maintenance of the Cross violates the Establishment Clause.

V.

For the foregoing reasons, the judgment of the district court is

REVERSED AND REMANDED.[19]

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[19] Upon remand, the parties should note that this opinion does not presuppose any particular result (i.e., removing the arms or razing the Cross entirely); rather, the parties are free to explore alternative arrangements that would not offend the Constitution.

APPENDIX

(J.A. 34)[20]

[20] A photograph of the Cross prior to the filing of this case.

(J.A. 1098)[21]

[21] A photograph of the Cross from 2014 prior to the filing of this case.

(J.A. 1891)[22]

(Supp. J.A. 2)[23]

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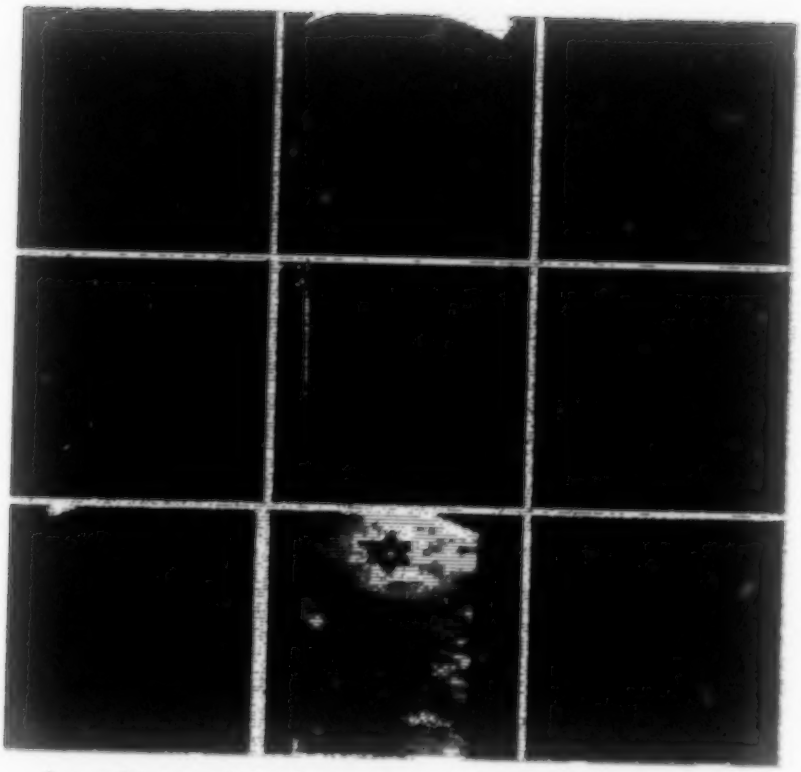
[22] A photograph of the weathered plaque located on the base of the Cross.

[23] An overhead image of the Veterans Memorial Park. The Cross is located slightly to the left of center, titled "WWI Memorial."



As referenced in footnote 17, images of headstones in Arlington National Cemetery adorned with diverse religious symbols, identified from top left to bottom right: Soka Gakkai, Christianity, Buddhism, Wicca, Islam, Catholicism, United Church of Christ, Judaism, and Atheism. Arlington National Cemetery, https://pbs.twimg.com/media/CUa2t63VEAEo IfE.jpg.

GREGORY, Chief Judge, concurring in part and dissenting in part:

I agree with the majority's holding that Appellants have standing under 42 U.S.C. § 1983 to bring this action for a violation of the Establishment Clause. But I disagree with the majority's ultimate conclusion that the display and maintenance of the war memorial in this case violates the Establishment Clause. I therefore respectfully dissent in part.

I.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. To properly understand and apply the Establishment Clause, it must be viewed "in the light of its history and the evils it was designed forever to suppress." *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15 (1947). The early colonization of America was a time marked with religious persecution. Immigrating settlers fled religious suppression in Europe only to be met with similar treatment in America. "[M]en and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated." *Id.* at 10. Those regarded as nonconformists were required "to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters." *Id.*

The Establishment Clause was intended to combat the practice of "compel[ling individuals] to support and attend government favored churches." *Id.* at 8; *accord*

Myers v. Loudoun Cty. Pub. Sch., 418 F.3d 395, 402 (4th Cir. 2005). The Clause's historical setting reveals that "[i]ts first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). The realization of its goal meant that the government must "'neither engage in nor compel religious practices,' that it must 'effect no favoritism among sects or between religion and nonreligion,' and that it must 'work deterrence of no religious belief.'" *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (plurality opinion) (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

But the Clause does not require the government "to purge from the public sphere" any reference to religion. *Id.* at 699. "Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* (citations omitted). While neutrality may be the "touchstone" of the Establishment Clause, it more so serves as a "sense of direction" than a determinative test. *McCreary Cty. v. Am. Civil Liberties Union*, 454 U.S. 844 (2005). We cannot view neutrality as some sort of "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring). Thus, in reviewing the challenged war memorial, this Court must seek general rather than absolute neutrality. We do so by engaging in the three-factor analysis delineated in *Lemon v. Kurtzman* (the "*Lemon* test"), which requires that the memorial have

a secular purpose; have a principal or primary effect that neither advances, inhibits, nor endorses religion; and not foster "an excessive government entanglement with religion." 403 U.S. 602, 612–13 (1971). The memorial "must satisfy each of the *Lemon* test's three criteria" to pass constitutional muster. *Lambeth v. Bd. of Comm'rs of Davidson Cty.*, 407 F.3d 266, 269 (4th Cir. 2005) (citing *Mellen v. Bunting*, 327 F.3d 355, 367 (4th Cir. 2003)).

II.

A.

I will briefly reiterate the operative facts. In Bladensburg, Maryland, in a median at the intersection of Maryland Route 450 and U.S. Route 1, stands a war memorial consisting of a forty-foot-tall concrete Latin cross (the "Memorial"). The Memorial and the median are currently owned by Appellee Maryland-National Capital Park and Planning Commission (the "Commission"). Intervenor-Appellee American Legion's symbol is displayed in the middle of the cross on both faces. The cross sits on a base and includes a plaque that lists the names of the forty-nine Prince George's County residents who died in World War I. J.A. 1891. The plaque also states, "THIS MEMORIAL CROSS DEDICATED TO THE HEROES OF PRINCE GEORGE'S COUNTY MARYLAND WHO LOST THEIR LIVES IN THE GREAT WAR FOR THE LIBERTY OF THE WORLD," and includes a quotation from President Woodrow Wilson. *Id.* Also, each face of the base is inscribed with one of four words: "VALOR," "ENDURANCE," "COURAGE," and "DEVOTION." J.A. 1963.

In 1918, a group of private citizens led the charge to construct and finance the Memorial. The donors signed a pledge stating that they, "trusting in God, the Supreme Ruler of the universe," pledged their faith in the forty-nine war dead, whose spirits guided them "through life in the way of godliness, justice, and liberty." J.A. 1168. The group also circulated a fundraising flyer stating,

> Here, those who come to the Nation's Capital to view the wonders of its architecture and the sacred places where their laws are made and administered may, before this Cross, rededicate[] themselves to the principles of their fathers and renew the fires of patriotism and loyalty to the nation which prompted these young men to rally to the defense of the right. And here the friends and loved ones of those who were in the great conflict will pass daily over a highway memorializing their boys who made the supreme sacrifice.

J.A. 2303.

A groundbreaking ceremony was held for the Memorial and for Maryland Route 450 (then known as the National Defense Highway) in late 1919. Several local officials spoke about the fallen soldiers and how both the Memorial and highway would commemorate their bravery and sacrifice. But the private group ultimately failed to raise enough money to construct the Memorial and abandoned the project. The local post of the American Legion, a congressionally chartered veterans service organization, then took up the task and completed the Memorial on July 25, 1925. That day, the post held a ceremony which included

multiple speeches regarding the Memorial's representation of the men who died fighting for this country and an invocation and benediction delivered by local clergymen.

Over time, additional monuments honoring veterans were built near the Memorial (known as the "Veterans Memorial Park"). Because the Memorial sits in the middle of a median and is separated by a busy highway intersection, the closest additional monument is about 200 feet away. Since the Memorial's completion, numerous events have been hosted there to celebrate Memorial Day, Veterans Day, the Fourth of July, and the remembrance of September 11th. These ceremonies usually include an invocation and benediction, but the record demonstrates that only three Sunday religious services were held at the Memorial — all of which occurred in August 1931. J.A. 347.

Due to increasing traffic on the highway surrounding it, the Commission acquired the Memorial and the median where it is located from the American Legion in March 1961. Since that time, the Commission has spent approximately $117,000 to maintain and repair the Memorial. In 2008, it set aside an additional $100,000 for renovations, of which only $5,000 has been spent as of 2015. J.A. 562–65. On February 25, 2014, more than fifty years after the Memorial passed into state ownership, Appellants initiated this suit against the Commission under 42 U.S.C. § 1983 alleging a violation of the Establishment Clause.

B.

By concluding that the Memorial violates the Establishment Clause, the majority employed the *Lemon* test "with due consideration given to the factors outlined in *Van Orden*." Maj. Op. at 16. In *Van Orden*, a plurality of the Supreme Court determined that the *Lemon* test was not useful when evaluating a "passive monument." 545 U.S. at 686. Instead, the Court's analysis was "driven both by the nature of the monument and by our Nation's history." *Id.* As the majority recognizes, Justice Breyer's concurrence is the controlling opinion in *Van Orden*. Maj. Op. at 14. Justice Breyer states that the Court's Establishment Clause tests, such as *Lemon*, cannot readily explain the Clause's tolerance of religious activities in "borderline cases," as there is "no single mechanical formula that can accurately draw the constitutional line in every case." *Van Orden*, 454 U.S. at 699–700 (Breyer, J., concurring). "If the relation between government and religion is one of separation, but not of mutual hostility and suspicion, one will inevitably find difficult borderline cases." *Id.* at 700. Instead of applying *Lemon* to the challenged Ten Commandments display, Justice Breyer exercised his "legal judgment" and evaluated the context of the display and how the undeniably religious text of the Commandments was used. *Id.* at 700–04. His concurrence, however, also noted that *Lemon* provides a "useful guidepost[]—and might well lead to the same result"—for "no exact formula can dictate a resolution to such fact-intensive cases." *Id.* at 700.

Relying on *Lemon*, and drawing guidance from *Van Orden*, the majority determined that the Commission articulated a legitimate secular purpose for displaying

the Memorial. Nevertheless, the majority concluded that the Memorial failed *Lemon*'s second and third factors, finding that a reasonable observer would conclude that the Memorial has the primary effect of endorsing religion and the Commission's maintenance of the Memorial constitutes excessive entanglement with religion. In my view, the majority misapplies *Lemon* and *Van Orden* to the extent that it subordinates the Memorial's secular history and elements while focusing on the obvious religious nature of Latin crosses themselves; constructs a reasonable observer who ignores certain elements of the Memorial and reaches unreasonable conclusions; and confuses maintenance of a highway median and monument in a state park with excessive religious entanglement.

III.

Because Appellants do not challenge the district court's finding that the Commission has demonstrated a secular purpose for displaying and maintaining the Memorial (the first *Lemon* factor), I will discuss in turn the majority's evaluation of the second and third *Lemon* factors — whether the Memorial has the primary effect of advancing or inhibiting religion and whether the government is excessively entangled with religion.

A.

Under *Lemon*'s second factor, we must determine "whether a particular display, with religious content, would cause a reasonable observer to fairly understand it in its particular setting as impermissibly advancing or endorsing religion." *Lambeth*, 407 F.3d at 271. This reasonable observer

inquiry "requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the [display] and its placement." *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (plurality opinion). We should not ask "whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think the State endorses religion." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) (internal quotation marks omitted). Instead, we must determine "whether . . . the display's principal or primary effect is to advance or inhibit religion; or, put differently, whether an informed, reasonable observer would view the display as an endorsement of religion." *Lambeth*, 407 F.3d at 272.

It is undeniable that the Latin cross is the "preeminent symbol of Christianity." Maj. Op. at 18. But we must be careful not to "focus exclusively on the religious component" of a display, as that "would inevitably lead to its invalidation under the Establishment Clause." *Lambeth*, 407 F.3d at 271 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)). Indeed, the Supreme Court "has consistently concluded that displays with religious content—but also with a legitimate secular use—may be permissible under the Establishment Clause." *Id.* (citing *Cty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 579 (1989)). A reasonable observer would be aware that the cross is "not merely a reaffirmation of Christian beliefs," for it is "often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an

honored place in history for this Nation and its people." *Buono*, 559 U.S. at 721.

Despite the religious nature of the Latin cross, a reasonable observer must also adequately consider the Memorial's physical setting, history, and usage. The Memorial was created to commemorate the forty-nine soldiers who lost their lives in World War I, as explicitly stated on the plaque attached to its base. *See* J.A. 1891 ("THIS MEMORIAL CROSS DEDICATED TO THE HEROES OF PRINCE GEORGE'S COUNTY MARYLAND WHO LOST THEIR LIVES IN THE GREAT WAR FOR THE LIBERTY OF THE WORLD."). The plaque also includes a quotation from President Woodrow Wilson stating, "The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives." *Id.* Each face of the cross includes the American Legion seal and each face of the base is inscribed with one of four words: "VALOR," "ENDURANCE," "COURAGE," and "DEVOTION." J.A. 1963. The Memorial has functioned as a war memorial for its entire history, and it sits among other secular monuments in Veterans Memorial Park, though it is separated from the other monuments by intersecting highways.

The majority concludes that the size of the Latin cross making up the Memorial overwhelms these secular elements. In the majority's view, the Memorial is unconstitutional based predominantly on the size of the cross, and neither its secular features nor history could overcome the presumption. But such a conclusion is contrary to our constitutional directive. We must fairly weigh the appearance, context, *and*

factual background of the challenged display when deciding the constitutional question. *See Lynch*, 465 U.S. at 679–80; *Cty. of Allegheny*, 492 U.S. at 598–600. Although a reasonable observer would properly notice the Memorial's large size, she would also take into account the plaque, the American Legion symbol, the four-word inscription, its ninety-year history as a war memorial, and its presence within a vast state park dedicated to veterans of other wars. Would the majority's version of a reasonable observer be satisfied and better equipped to evaluate the Memorial's history and context if the cross were smaller? Perhaps if it were the same size as the other monuments in the park? Though Establishment Clause cases require a fact-intensive analysis, we must bear in mind our responsibility to provide the government and public with notice of actions that violate the Constitution. What guiding principle can be gleaned from the majority's focus on the cross's size? Understandably, the majority's decision would lead to per se findings that all large crosses are unconstitutional despite any amount of secular history and context, in contravention of Establishment Clause jurisprudence.

The majority also makes much of the Memorial's isolation from the other monuments in Veterans Memorial Park, as it sits in the median of a now busy highway, making it difficult to access. But a reasonable observer would note that the Memorial was placed there as part of the concurrent creation of the National Defense Highway to commemorate the soldiers of World War I, not as a means of endorsing religion. And, though Veterans Memorial Park does not include any other religious symbols as memorials, there is no evidence that the state formally foreclosed

the possibility of erecting any other religious symbol. Also, the reasonable observer would note that the Memorial's physical setting does not lend itself to any religious worship. *Van Orden*, 545 U.S. at 702 (stating that religious display's location in large park containing other monuments suggested "little or nothing sacred," as it illustrated residents' historical ideals and "did not readily lend itself to meditation or any other religious activity").

Additionally, due to the Memorial's location, the majority explains that a reasonable observer would not be able to easily examine the Memorial's secular elements. Maj. Op. at 23. This is because the Memorial "is located in a high-traffic area and passers-by would likely be unable to read the plaque," which is small and badly weathered. *Id.* at 23. However, the reasonable observer's knowledge is not "limited to the information gleaned simply from viewing the challenged display." *Pinette*, 515 U.S. at 780–81 (O'Connor, J., concurring). That the average person in the community may have difficulty viewing all of the secular elements of the Memorial while stuck in traffic or driving at high speeds is of no consequence, for the reasonable observer "is not to be identified with any ordinary individual, . . . but is rather a personification of a community ideal of reasonable behavior" who is "deemed aware of the history and context of the community and forum in which the religious display appears." Id. at 779–80 (internal quotation marks and citations omitted). Thus, the reasonable observer's ability to consider these secular elements is by no means diminished.

Further, quoting *Trunk v. City of San Diego*, 629 F.3d 1099, 1116 n.18 (9th Cir. 2011), the majority

states that the large size and isolation of the Memorial "evokes a message of aggrandizement and universalization of religion, and not the message of individual memorialization and remembrance that is presented by a field of gravestones." Maj. Op. at 22. In *Trunk*, the Ninth Circuit considered a forty-three-foot free-standing cross and veterans memorial erected in a state park. 629 F.3d at 1101. The court evaluated the history of the Latin cross generally, its use as a war memorial, the history of the particular war memorial at issue, and its physical setting. *Id.* at 1102–05, 1110–24. The cross in *Trunk* had no secular elements; instead, it was unadorned and without any physical indication that it was a war memorial until after litigation was initiated to remove it. *Id.* at 1101–02; *see also Smith v. Cty. of Albemarle*, 895 F.2d 953, 958 (4th Cir. 1990) (concluding that crèche, unassociated with any secular symbols, prominently displayed in front of government building, and unaccompanied by any other religious or nonreligious displays, conveyed message of governmental endorsement of religion). The court concluded that a reasonable observer would perceive the presence of the cross as the federal government's endorsement of Christianity, due in part to its long history of serving as a site of religious observance, with no indication of any secular purpose for almost three decades. *Id.* at 1125.

But here, the Memorial has always served as a war memorial, has been adorned with secular elements for its entire history, and sits among other memorials in Veterans Memorial Park. The Memorial's predominant use has been for Veterans Day and Memorial Day celebrations, although three religious

services were conducted at the Memorial nearly ninety years ago. Also, the invocations and benedictions performed at the annual veterans celebrations are not enough to cause a reasonable observer to perceive the Memorial as an endorsement of Christianity in light of its overwhelmingly secular history and context. Further, guidance from *Van Orden* provides that the Memorial's ninety-year existence and fifty-year government ownership without litigation is a strong indication that the reasonable observer perceived its secular message. *See* 545 U.S. at 702–03 (stating that challenged monument's presence on government property for forty years provided determinative factor that it conveyed predominately secular message). The Memorial stands at a busy intersection, yet this case is the first time the Memorial has been challenged as unconstitutional. Those fifty years strongly suggest "that few individuals, whatever their system of beliefs, are likely to have understood the [Memorial] as amounting, in any significantly detrimental way, to a government effort . . . primarily to promote religion over nonreligion," or to "engage in," "compel," or deter any religious practice or beliefs. *Id.* at 702 (quoting *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring)); *see also Buono*, 559 U.S. at 716 ("Time also has played its role. [After] nearly seven decades[,] . . . the cross and the cause it commemorated had become entwined in the public consciousness."). This significant passage of time must factor into the Court's analysis and "help[] us understand that as a practical matter of degree [the Memorial] is unlikely to prove divisive." *Van Orden*, 545 U.S. at 702.

With the foregoing facts, circumstances, and principles in mind, I conclude that a reasonable

observer would understand that the Memorial, while displaying a religious symbol, is a war memorial built to celebrate the forty-nine Prince George's County residents who gave their lives in battle. Such an observer would not understand the effect of the Commission's display of the Memorial—with such a commemorative past and set among other memorials in a large state park—to be a divisive message promoting Christianity over any other religion or nonreligion. A cross near a busy intersection "need not be taken as a statement of governmental support for sectarian beliefs. The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society. Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework." *Buono*, 559 U.S. at 718–19 (citations omitted). We must be careful not to push the Establishment Clause beyond its purpose in search of complete neutrality. "[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands," but of extreme commitment to the secular, "or even active, hostility to the religious." *Van Orden*, 545 U.S. at 699 (quoting *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring)). Finding that a reasonable observer would perceive the Memorial as an endorsement of Christianity would require that we pursue a level of neutrality beyond our constitutional mandate. I therefore conclude that the Memorial does not violate the second factor of the *Lemon* test.

B.

The *Lemon* test's final factor asks whether the challenged display has created an "excessive entanglement" between government and religion. *Lambeth*, 407 F.3d at 272–73. "The kind of excessive entanglement of government and religion precluded by *Lemon* is characterized by 'comprehensive, discriminating, and continuing state surveillance.'" *Id.* at 273 (quoting *Lemon*, 403 U.S. at 619). This inquiry is one of "kind and degree," *Lynch*, 465 U.S. at 684, "and because some interaction between church and state is inevitable, the Supreme Court has reaffirmed that the '[e]ntanglement must be "excessive" before it runs afoul of the Establishment Clause,'" *Koenick v. Felton*, 190 F.3d 259, 268 (4th Cir. 1999) (quoting *Agostini v. Felton*, 521 U.S. 203, 233 (1997)).

The majority concludes that the Memorial fosters excessive entanglement because of the Commission's ownership and maintenance of the Memorial. But the Commission's maintenance of the Memorial and the land surrounding it could hardly be considered the sort of state surveillance that *Lemon* intends to prohibit. *See Lemon*, 403 U.S. at 615–20 (concluding that challenged action excessively entangled state with religion by requiring state to supplement salaries for teachers in parochial schools); *see also Mellen*, 327 F.3d at 375 (determining that public university's supper prayer violated *Lemon*'s third prong because school officials "composed, mandated, and monitored a daily prayer"). Rather, the Commission is merely maintaining a monument within a state park and a median in between intersecting highways that must be well lit for public safety reasons. There is no

evidence that the Commission consults with any churches or religious organizations to determine who may access the Memorial for events. Nor is there evidence that the Commission is required to be involved in any church-related activities to maintain the Memorial.

Further, the majority observes that "any use of public funds to promote religious doctrines violates the Establishment Clause." *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring). But, in *Agostini*, the Supreme Court held that a federally funded program that paid public school teachers to teach disadvantaged children in parochial schools did not cause an excessive entanglement between church and state. 521 U.S. at 234–35. Likewise, the Commission's use of $122,000 over the course of fifty-plus years for lighting and upkeep is not a promotion of any religious doctrine, as the Memorial is a historical monument honoring veterans.

I therefore conclude that the Memorial does not violate the third factor of the *Lemon* test.

* * *

This Memorial stands in witness to the VALOR, ENDURANCE, COURAGE, and DEVOTION of the forty-nine residents of Prince George's County, Maryland "who lost their lives in the Great War for the liberty of the world." I cannot agree that a monument so conceived and dedicated and that bears such witness violates the letter or spirit of the very Constitution these heroes died to defend. Accordingly, I would affirm the district court's judgment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

AMERICAN HUMANIST ASSOCIATION, et al.	:	
v.	:	Civil Action No. DKC 14-0550
MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION	:	

MEMORANDUM OPINION

Presently pending and ready for resolution in this Establishment Clause case is a motion for summary judgment filed by Plaintiffs American Humanist Association, Steven Lowe, Fred Edwords, and Bishop McNeill. (ECF No. 80).[1] Also pending are cross-motions for summary judgment filed by Defendant Maryland- National Capital Park and Planning Commission (the "Commission") (ECF No. 86) and

[1] Plaintiffs' initial motion for summary judgment (ECF No. 78) contained a separate statement of undisputed facts that was outside the length limitations found in Local Rule 105.3, as amended by court order. Plaintiffs' corrected motion for summary judgment is the operative motion. (ECF No. 80).

Intervenor-Defendants American Legion, The American Legion Department of Maryland, and The American Legion Colmar Manor Post 131. (the "American Legion") (ECF No. 83).[2] Finally, three motions for leave to file memoranda as *amici curie* are pending. (ECF Nos. 94; 95; 96). The relevant issues have been fully briefed, and the court now rules, no hearing being deemed necessary. Local Rule 105.6. For the following reasons, Plaintiffs' motion for summary judgment will be denied and Defendants' motions for summary judgment will be granted. The motions for leave to file as *amici curie* will be denied.

I. Background

A. Factual Background[3]

Standing at the intersection of Maryland Route 450 and U.S. Route 1 in Bladensburg, Maryland, is a memorial monument consisting, in part, of a large concrete Latin cross that is approximately forty feet tall. (ECF No. 83-6). Plaintiffs denoted the memorial as "The Bladensburg Cross" in the complaint, but acknowledge that it is also referred to as the "Peace Cross." Other references in the record use the name "Memorial Cross." Defendants use the term "Bladensburg Memorial" or some variation. In this opinion, except when referring to the name used in an historical reference, the term "Monument" will be

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[2] Because the American Legion filed its motion for summary judgment only to assist the Commission in its defense, the two motions will be considered together. *See Hewett v. City of King*, 29 F.Supp.3d 584, 598 (M.D.N.C. 2014). Accordingly, the Commission and the American Legion will be collectively referred to as the "Defendants."

[3] Unless otherwise noted, the following facts are undisputed.

used. The Monument and the median are currently owned by the Commission. (ECF Nos. 83-44; 83-45). The symbol of the American Legion is displayed in the middle of both faces of the cross. (ECF No. 83-2). The cross sits on a rectangular base, and the West face of the base contains a plaque listing the names of forty-nine men from Prince George's County who died in World War I. The plaque also reads: "This Memorial Cross Dedicated to the heroes of Prince George's County Maryland who lost their lives in the Great War for the liberty of the world," and includes a quotation from President Woodrow Wilson. Four words are inscribed directly above the base, on the bottom of the cross itself, one on each face: "valor; endurance; courage; devotion." An American flag flies on one side of the cross.

1. Creation of the Monument

The initial effort to construct and finance the Monument began in late 1918 and early 1919, led by a group of private citizens organized as the Prince George's County Memorial Committee (the "Memorial Committee"). (ECF Nos. 83-4, at 2; 83-10, at 4; 83-14; 83-25, at 2; 83-36, at 3). The fundraising effort garnered significant publicity at the time, including reports highlighting the link between the Monument and the National Defense Highway. (ECF No. 83-31). These early organizers circulated fundraising pledge sheets that read:

> We, the citizens of Maryland, trusting in God, the supreme ruler of the universe, pledge faith in our brothers who gave their all in the World War to make the world safe for democracy. Their mortal bodies have turned to

> dust, but their spirit lives to guide us through life in the way of godliness, justice, and liberty.
>
> With our motto, "one god, one country and one flag," we contribute to this memorial cross commemorating the memory of those who have not died in vain.

(ECF No. 80-32, at 3). The Memorial Committee circulated a fundraising flyer announcing the upcoming creation of the Monument and the National Defense Highway (now Maryland Route 450), which runs from Bladensburg to Annapolis. (ECF No. 83-25, at 2). The flyer noted that the "Memorial Cross will stand in a strategic position at the point where the Washington-Baltimore Boulevard joins the Defense Highway leading from Washington to Annapolis." (*Id.* at 3). The flyer also explained that:

> those who come to the Nation's Capital to view the wonders of its architecture and the sacred places where their laws are made and administered may, before this Cross, rededicate[] themselves to the principles of their fathers and renew the fires of patriotism and loyalty to the nation which prompted these young men to rally to the defense of the right. And here the friends and loved ones of those who were in the great conflict will pass daily over a highway memorializing their boys who made the supreme sacrifice.

(*Id.*).

A groundbreaking ceremony was held for the Monument and the National Defense Highway on September 28, 1919. (ECF No. 83-4, at 4). At the time of the groundbreaking, the land was owned by the

Town of Bladensburg (the "Town"). (ECF Nos. 83-6, at 10; 83-37; 90, at 17; 92, at 10). Families of the veterans participated in the ceremony, and Josephus Daniels, then- Secretary of the Navy, was the primary speaker. (ECF Nos. 83-9, at 5; 83-10, at 15). Secretary Daniels addressed both the Monument and the National Defense Highway: "A concrete highway . . . that will never fail in rain or sun, that every day in the year will present an unalterable face to every duty expected of it, as did the men in whose honor it was named; and a cross that will stand for time and eternity, like the principles they defended." (*Id.*). According to records from the Prince George's County Historical Society Library, "The Marine Band provided music, several speeches were given by local officials and the exercises were concluded by the singing of The Star Spangled Banner." (ECF No. 83-10, at 15 (internal quotation marks omitted)).

The Memorial Committee continued its fundraising efforts, but ultimately failed to raise enough money and abandoned their efforts in 1922. (*Id.* at 16). Because construction on the Monument had begun but was unfinished, the local post of the American Legion (the "Snyder-Farmer Post") assumed responsibility for completing the Monument. (ECF Nos. 83-12, at 26–27; 83-36, at 4–5). The parties dispute if the Town officially transferred the land to the Snyder-Farmer Post.[4] (*See* ECF Nos. 83-1, at 30; 90, at 17). In 1922, the Town passed a resolution that:

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[4] The legal ownership of the land from 1922 until 1956 is disputed, but this fact is not material to the outcome of this case. The record indicates that the Snyder-Farmer Post had control

> authorize[d] the Snyder-Farmer Post of the American Legion to complete said Cross and its surroundings in such manner as the Post may deem advisable; and, to this end, the Town Commissioners of Bladensburg, Maryland do hereby assign and grant to the said Snyder-Farmer Post #3, American Legion, that parcel of ground upon which the cross now stands and that part necessary to complete the park around said cross, to the perpetual care of Snyder-Farmer Post #3 as long as it is in existence, and should the said Post go out of existence the plot to revert to the Town of Bladensburg, together with the cross and its surroundings.

(ECF No. 83-37). Counsel for the Snyder-Farmer Post contended that this resolution was recorded in the land records of Prince George's County on April 30, 1935. (*See* ECF No. 83-45, at 2). Subsequent historical accounts appear to note either that the Town did in fact officially convey the land to the American Legion post (*see, e.g.*, ECF Nos. 80-24, at 2; 80-33, at 4; 83-4, at 3; 83-10, at 16) or express uncertainty about the ownership history of the land (see ECF No. 92-2, at 2).

The Snyder-Farmer Post succeeded in raising the funds required to complete the Monument. (ECF No. 83-4, at 4). The Snyder-Farmer Post held a dedication ceremony for the Monument on July 12, 1925. (ECF Nos. 83-4, at 4; 83-39). According to a contemporaneous news account, Representative

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over the land from 1922 until 1956, and a government entity controlled the land at all other times.

Stephen Gambrill of Maryland's Fifth Congressional District delivered the keynote address, stating, in part:

> Where we of the past generation have failed to prevent war, perhaps you young men of the American Legion or the mothers who gave their sons to the conflict may succeed.

And

> You men of Prince George's county fought for the sacred right of all to live in peace and security and by the token of this cross, symbolic of Calvary, let us keep fresh the memory of our boys who died for a righteous cause.

(ECF No. 83-39). The Army Music School band provided music for the dedication, local officials and figures delivered remarks, and local clergy offered an invocation and benediction. (ECF Nos. 80-28).

2. Subsequent Control and Use of the Monument and Veterans Memorial Park

In 1935, due to increased traffic on the roads surrounding the Monument, the Maryland state legislature "authorized and directed" the State Roads Commission "to investigate the ownership and possessory rights" of the area surrounding the Monument and to acquire the land "by purchase or condemnation." (ECF No. 83-40, at 2). Plaintiffs contend that the tract of land in question was *adjacent* to the Monument, but did not include the Monument itself – they maintain that the Monument has always been owned by a government entity. (ECF No. 90, at 19). Defendants assert that the Snyder-Farmer Post owned the Monument and the land on which it sat.

(ECF Nos. 83-1, at 31–32; 92, at 10). The record is not entirely clear as to exactly what land was transferred and when. Ultimately, the State Roads Commission obtained title to the tract mentioned in the state statute and conveyed it to the Commission by deed in 1960. (ECF No. 83-44). On March 1, 1961, to resolve any ambiguities, the Snyder-Farmer Post "transfer[ed] and assign[ed] to [the Commission] all its right, title and interest in and to the Peace Cross, also originally known as the Memorial Cross, and the tract upon which it is located and surrounded and bounded by the curbings and boundary lines of the highways of the State Roads commission adjoining the said Cross parcel." (ECF No. 83-45, at 4). The Commission "assume[d] the obligation of maintaining, repairing and otherwise caring for" the Monument, but the Snyder-Farmer Post reserved "the right and the privilege to hold memorial services to departed veterans and other ceremonies upon the parcel on appropriate dates and occasions." (*Id.* at 5). The Commission continues to own the Monument and the land on which it sits. (*See* ECF No. 83-13, at 6).

The Monument now sits amidst additional monuments as part of Veterans Memorial Park. (ECF No. 83-8, at 2). The National Park Service placed among the memorials a "Star-Spangled Banner National Historic Trail Marker" highlighting the Monument and the other monuments in the park. (ECF No. 86-11). In 1944, local American Legion posts dedicated a World War II memorial across the street from the Monument honoring the men and women of Prince George's County who died in that war. (ECF No. 83-9, at 7). Nearby, a plaque and tree commemorate the lives lost at Pearl Harbor.

Following a joint public-private effort, a memorial to veterans of Korea and Vietnam was dedicated on July 4, 1983. (*Id.* at 8). In 2006, an arcing stone walkway bordered by a granite ledge and a garden was built in the park to remember lives lost on September 11th. (ECF Nos. 83-1, at 5; 86, at 7–8). In 2010, the Town and the Anacostia Trails Heritage Area, Inc. convened a task force to explore ideas for monuments and events to commemorate the 200th anniversary of the War of 1812 and the Battle of Bladensburg. (ECF No. 86-25, at 4). Currently, there is a War of 1812 memorial just north of the Monument, and the Commission is in the process of installing two thirty-eight-foot-tall statues of soldiers representing the British Army and the defending American forces of the Battle of Bladensburg. (*Id.*). Finally, Veterans Memorial Park includes a flag display of the American flag, the Maryland flag, and the Prince George's County flag. (ECF No. 83-2, at 14).

Numerous events and gatherings have been held at the Monument and Veterans Memorial Park, the vast majority in commemoration of Memorial Day or Veterans Day. An invocation and benediction are often included. (ECF Nos. 80-41; 83-1, at 35–36; 83-9, at 6; 83-11, at 9–11). Local posts of the American Legion have hosted many of the Memorial Day and Veterans Day programs at the Monument and in the surrounding park, which often feature local government officials and representatives of other veterans' organizations. (ECF No. 83-11, at 9–11). The Town, through organizations such as the Bladensburg Patriotic Committee and the Bladensburg Promotional Committee, also has held events in conjunction with Memorial Day, Veterans

Day, the Fourth of July, and in remembrance of September 11th at the Monument or in the surrounding park. (ECF Nos. 80-7, at 7–8; 83-11, at 12). The events generally follow the same format and include a presentation of colors, the national anthem, an invocation, a keynote speaker (typically a veteran, military, local government, or American Legion official), songs or readings, the laying of a wreath or flowers, a benediction, and a reception. (*See, e.g.*, ECF Nos. 80-51; 83-68). Local American Legion posts, the Town, the Commission, and other government entities have also hosted rededications and other patriotic ceremonies at the Monument. (*See, e.g.*, ECF Nos. 80-50; 83-53). Although Defendants and the American Legion contend that no religious services have been held at the Monument, Plaintiffs point to a *Washington Post* column indicating that there were at least three Sunday religious services held at the Monument in 1931.[5] (ECF No. 80-41, at 6).

While the Monument was built with private donations, the Commission has devoted resources over the years to maintain and illuminate it. Bladensburg

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[5] Plaintiffs provide evidence supporting their assertion that some religious services were held at the Monument. On the other hand, their allegations regarding the involvement of the Ku Klux Klan with the Monument are not supported by the record. Plaintiffs point to news reports regarding Klan events in Prince George's County held in the 1920s, but only one of these reports, a community calendar entry in *The Washington Post*, mentions the Monument, noting that "Robed klansmen will direct persons desiring to attend from the peace cross at Bladensburg to the fiery cross at Lanham." (ECF No. 80-45, at 5). The rally was not held at the Monument and there is no indication that the Monument was an official meeting point. Plaintiffs' suggestion of some connection is simply wrong. (*See* ECF No. 92, at 22 n.7).

Rotarians funded the installation of lights to illuminate the cross in 1965. (ECF No. 80-47). The Commission funds routine maintenance and lighting of the Monument (ECF No. 80-11, at 13) and has spent at least $117,000 on the Monument, including $100,000 on significant renovations in 1985. (ECF Nos. 80-1, at 24; 80-50, at 8). In 2008, the Commission budgeted an additional $100,000 for further repairs to the Monument that has not yet been entirely spent. (ECF No. 80-11, at 8).[6]

B. Procedural History

Plaintiffs commenced this action under 42 U.S.C. § 1983 on February 25, 2014, contending that the ownership, maintenance, and prominent display of the Monument on public property violates the Establishment Clause of the First Amendment of the United States Constitution, as applied to Maryland by the Fourteenth Amendment. They seek a declaratory judgment, an injunction, nominal damages, attorneys' fees, and costs. (ECF No. 1).[7] Defendant Commission filed an answer on April 28, 2014.

(ECF No. 12). Intervenor-Defendants American Legion, et al. filed a motion to intervene (ECF No. 14), which was granted on September 18, 2014 (ECF Nos. 46; 47). On May 5, 2015, Plaintiffs filed the pending corrected motion for summary judgment. (ECF No. 80). On June 10, 2015, Intervenor- Defendants filed

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[6] After this case was filed, the National Park Service placed the Monument on the National Register of Historic Places. (ECF No. 97-2).

[7] The specific injunctive relief sought in the Motion for Summary Judgment includes removal of the Monument, its demolition, or removal of the arms. (ECF No. 80, at 2).

the pending cross-motion for summary judgment and response in opposition to Plaintiffs' motion. (ECF No. 83). One day later, the Commission filed the pending cross-motion for summary judgment and response in opposition to Plaintiffs' motion. (ECF No. 86). Plaintiffs filed a response in opposition to Defendants' motions (ECF No. 90), and Defendant- Intervenors replied (ECF No. 92).

On April 25, 2014, prospective *amici curiae* moved for leave to appear jointly as *amicus curiae* in support of Defendants and to file an *amicus curiae* memorandum. (ECF No. 11). By memorandum opinion and order issued on September 18, 2014, the undersigned granted in part the motion to appear jointly as *amicus curiae* and for leave to file an amicus curiae memorandum. (ECF Nos. 46; 47). The proposed *amici curiae* were permitted to participate as *amicus curiae*. The court noted, however, because no dispositive motions had yet been filed, the proposed memorandum submitted by the *amici curiae* would not be considered at that time. On September 15, 2015, the same prospective *amici curiae* filed an unopposed second motion for leave to file a memorandum in support of Defendants together with their memorandum. (ECF No. 94). On October 1, 2015, the Center for Inquiry filed a motion for leave to appear as *amicus curiae* in support of Plaintiffs and to file an *amicus curiae* memorandum. (ECF Nos. 95). Intervenor-Defendants do not oppose this motion, but the Center for Inquiry did not receive a response from Defendants. Also on October 1, 2015, the Council on American- Islamic Relations ("CAIR") filed a motion for leave to appear as *amicus curiae* in support of Plaintiffs and to file an *amicus curiae* memorandum.

(ECF No. 96). CAIR attempted to obtain consent from Defendants and Intervenor-Defendants, but had not received a response by the time of filing.

II. Standard of Review

A court may enter summary judgment only if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008). Summary judgment is inappropriate if any material factual issue "may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *JKC Holding Co. LLC v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001).

"A party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of [his] pleadings,' but rather must 'set forth specific facts showing that there is a genuine issue for trial.'" *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir. 2003) (quoting former Fed.R.Civ.P. 56(e)). "A mere scintilla of proof . . . will not suffice to prevent summary judgment." *Peters v. Jenney*, 327 F.3d 307, 314 (4th Cir. 2003). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249–50 (citations omitted). At the same time, the court must construe the facts that are presented in the light most favorable to the party opposing the motion. *Scott v. Harris*, 550 U.S. 372, 378 (2007); *Emmett*, 532 F.3d at 297.

"When cross-motions for summary judgment are before a court, the court examines each motion separately, employing the familiar standard under Rule 56 of the Federal Rules of Civil Procedure." *Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351, 354 (4th Cir. 2011). The court must deny both motions if it finds there is a genuine dispute of material fact, "[b]ut if there is no genuine issue and one or the other party is entitled to prevail as a matter of law, the court will render judgment." 10A Charles A. Wright, et al., *Federal Practice & Procedure* § 2720 (3d ed. 1998).

III. Analysis

A. Establishment Clause Jurisprudence and Framework

The First Amendment provides that "Congress shall make no law respecting an establishment of religion," U.S. Const. amend. I, and the Supreme Court of the United States has applied this principle against the states and their subdivisions through the Fourteenth Amendment. *See Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 608 (4th Cir. 2012) (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)). Despite the straightforward simplicity of the clause, "[t]here is 'no single mechanical formula that can accurately draw the constitutional line'" in every Establishment Clause case. *Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005) (quoting *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring)). Indeed, Establishment Clause jurisprudence is a law professor's dream, and a trial judge's nightmare. In the words of Justice Clarence Thomas, "Establishment Clause jurisprudence [is] in

shambles." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S.Ct. 12, 13 (2011) (Thomas, J., dissenting from the denial of certiorari.)

Courts, including the United States Court of Appeals for the Fourth Circuit, often use the three-part test articulated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to assess alleged violations of the Establishment Clause. *See, e.g., Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227, 238 (2d Cir. 2014); *Moss*, 683 F.3d at 608; *Glassman v. Arlington Cnty.*, 628 F.3d 140, 146 (4th Cir. 2010) (determining *Lemon* to be the "appropriate test"); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1117 (10th Cir. 2010) (noting that "the touchstone for Establishment Clause analysis remains the tripartite test set out in *Lemon*") (citations and internal quotation marks omitted); *Hewett v. City of King*, 29 F.Supp.3d 584, 611 (M.D.N.C. 2014)(deciding the case "[u]nder the *Lemon* framework"). Most recently, the Fourth Circuit has articulated the *Lemon* test as requiring that, to pass constitutional muster, "government conduct (1) must be driven in part by a secular purpose; (2) must have a *primary effect* that neither advances nor inhibits religion; and (3) must not *excessively entangle* church and State." *Moss*, 683 F.3d at 608 (emphases in original) (citing *Lemon*, 403 U.S. at 612–13).

In 2005, a plurality of the Supreme Court recognized that, although commonly used, the *Lemon* test has not been uniformly applied to Establishment Clause cases. *Van Orden*, 545 U.S. at 684–86 (plurality opinion). In determining the constitutionality of a display of the Ten Commandments outside the Texas State Capitol, the plurality noted that the *Lemon* test "is not useful in

dealing with [such] passive monument[s]." *Id.* at 686. Instead the plurality's "analysis [was] driven both by the nature of the monument and by our Nation's history." *Id.* Justice Breyer, in a controlling opinion concurring in the judgment, *see Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (recognizing that "Justice Breyer's concurrence provides the controlling opinion"); *Myers*, 418 F.3d at 402 (treating Justice Breyer's opinion as controlling), noted that in "borderline cases" there is "no test-related substitute for the exercise of legal judgment." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring). Such judgment "must reflect and remain faithful to the underlying purposes of the [Establishment and Free Exercise] Clauses, and it must take account of context and consequences measured in light of those purposes." *Id.*

Not surprisingly, the parties disagree whether *Lemon* or *Van Orden* controls this case. (ECF Nos. 83-1, at 38; 90, at 36; 92 at 16). Courts deciding Establishment Clause cases post-*Van Orden* also disagree. The Fourth Circuit, immediately after *Van Orden*, applied Justice Breyer's "legal judgment" test from *Van Orden* to the exclusion of the *Lemon* test, in upholding a statute providing for daily, voluntary recitation of the Pledge of Allegiance in Virginia's public schools. *Myers*, 418 F.3d at 402. Myers is, however, the only Fourth Circuit case to cite to *Van Orden*. In recent years, the Fourth Circuit has continued to apply the *Lemon* test with no mention of *Van Orden*. *Moss*, 683 F.3d at 608; *Glassman*, 628 F.3d at 146; *see also Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030 n.14 (10th Cir. 2008) ("Supreme Court Justices have harshly criticized Lemon. . . . Nevertheless, the *Lemon* test clings to life because the

Supreme Court, in the series of splintered Establishment Clause cases since *Lemon* has never explicitly overruled the case."). Other courts have applied some hybrid form of the two tests. *See Salazar v. Buono*, 559 U.S. 700 (2010) (plurality opinion); Trunk, 629 F.3d at 1107. Ultimately, here, it is not necessary to resolve the legal conundrum. Both tests "require the [c]ourt to inquire into the nature, context, and history" of the Monument and lead to the same result. *See Hewett*, 29 F.Supp.3d at 611 (citing *Trunk*, 629 F.3d at 1107). Even if Justice Breyer's opinion in *Van Orden* controls, the *Lemon* test remains a "useful guidepost[]" for the court's analysis. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring).

B. *Lemon* Test

As noted above, "[t]o pass muster under the Establishment Clause, government conduct must be driven in part by a *secular purpose*; (2) must have a *primary effect* that neither advances nor inhibits religion; and (3) must not *excessively entangle* church and State." *Moss*, 683 F.3d at 608 (emphases in original) (citing *Lemon*, 403 U.S. at 612–13). Additionally, as part of Lemon's second prong, the Fourth Circuit examines "whether the governmental use of an object with religious meaning . . . ha[s] the effect of 'endorsing' religion." *Lambeth v. Bd. of Comm'rs of Davidson Cnty.*, 407 F.3d 266, 269 (4th Cir. 2005) (citing *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 593–94 (1989)).

1. Secular Purpose

The secular purpose prong of the *Lemon* test "presents a 'fairly low hurdle, which may be cleared by finding a plausible secular purpose.'" *Glassman*, 628

F.3d at 146 (quoting *Ehlers- Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283, 288 (4th Cir. 2000)). The government's purpose need not be "exclusively secular," *Jenkins v. Kurtinitis*, No. ELH-14-1346, 2015 WL 1285355, at *28 (D.Md. Mar. 20, 2015) (citing *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001)), as long as the government action is not "entirely motivated by a purpose to advance religion." *Hewett*, 29 F.Supp.3d at 611 (citing *Lambeth*, 407 F.3d at 270). "Under applicable Supreme Court precedent, a 'legitimate secular purpose' supporting a challenged governmental action will suffice to satisfy the *Lemon* test's first prong . . . unless the alleged secular purpose is in fact pretextual." *Lambeth*, 407 F.3d at 270 (citing *Santa Fe Ind. Sch. Dist. V. Doe*, 530 U.S. 290, 308–09 (2000); *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984)). Courts should "not lightly attribute unconstitutional motives to the government, particularly where [it] can discern a plausible secular purpose." *Hewett*, 29 F.Supp.3d at 612 (quoting *Davenport*, 637 F.3d at 1118) (internal quotation marks omitted).

Plaintiffs argue that displaying the Monument has a religious purpose. First, they argue that a Latin cross, which the Monument is, is "patently religious." (ECF No. 80-1, at 29–30). Plaintiffs also argue that the history of the cross "underscores its religious purpose." (*Id.* at 30–32). They also contend that the use of a religious symbol to achieve a secular goal is impermissible when a non-religious means will suffice. Defendants assert that the Commission's sole purpose for acquiring the land in the 1960s was not religious because it acquired the land for "highway expansion, traffic safety, protection of the Legion's residual property interests, [and] historic

preservation" reasons. (ECF No. 83-1, at 46). Defendants also argue that, even if the intent of the Monument's builders is relevant, the record shows that their intent was "commemorative rather than religious." (*Id.* at 47–52).

Although the Latin cross is undeniably a religious symbol, "[t]he fact that the monument conveys some religious meaning does not cast doubt on the [government's] valid secular purposes for its display." *Hewett*, 29 F.Supp.3d at 612 (citing *City of Elkhart v. Brooks*, 532 U.S. 1058, 1062 (2001)); *see also Buono*, 559 U.S. at 715 (plurality opinion) ("Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message."); *Mellen v. Bunting*, 327 F.3d 355, 374 (4th Cir. 2003) (assuming a secular purpose even though school-sponsored prayer "is plainly religious in nature"). Other courts have recognized that displaying a cross to honor fallen soldiers is a legitimately secular purpose, and does not always promote a religious message. *See Buono*, 559 U.S. at 715 (plurality opinion) (noting that "those who erected the cross intended simply to honor our Nation's fallen soldiers"); *Davenport*, 637 F.3d at 1118 (determining that the intent to use crosses for fallen state trooper memorials was not religious, partly because it was inspired by crosses in military cemeteries).

The focus of the first *Lemon* prong is "on the *government's* purpose, not that of a private actor." *Davenport*, 637 F. 3d at 1118. The alleged government conduct challenged in the complaint is the "ownership, maintenance and prominent display on public property" of the Monument. (ECF No. 1 ¶ 55). The Commission's actions are clearly driven by a plausible,

legitimate secular purpose. The Commission owns the Monument and surrounding land because it sits in the median of a busy highway interchange. The government determined that private ownership of the median would "create a serious menace to traffic" in light of increased use of the surrounding roads. (ECF No. 83-40, at 2). It is the government's secular responsibility to maintain the land on which the Monument sits just as it would any other highway median. In addition, the Commission's maintenance and display of the Monument independent of traffic concerns is also driven by a secular purpose, maintaining and displaying a "historically significant war memorial" that has honored fallen soldiers for almost a century. *See Trunk*, 629 F.3d at 1108 (holding that the government, in acquiring a memorial in the shape of a cross, articulated a plausible, legitimate secular purpose of "preserv[ing] a historically significant war memorial"). Nothing in the record indicates that the Commission's maintenance and display of the Monument is driven by a religious purpose whatsoever. The evidence of the Commission's secular purpose is uncontroverted.

Even the purpose of the private citizens who were behind the Monument's construction 90 years ago was a predominantly secular one. Plaintiffs refer to remarks made throughout the existence of the Monument in an attempt to illustrate its religious nature. (ECF Nos. 80-1, at 30–32; 90, at 52–55). Notably, a fundraising pledge sheet that was circulated contained expressly religious language (ECF No. 80-32, at 3 ("We, the citizens of Maryland, trusting in God, the supreme ruler of the universe, pledge faith in our brothers.")); the Monument was

sometimes described in religious terms such as "Cross of Calvary" and "Sacrifice Cross" (ECF No. 80-26); and many events at the Monument contain some religious components (ECF Nos. 80-51; 83-68). Even if these statements or events carry some religious meaning, they do not show an "entirely religious purpose" for the Monument, and, in fact, there is overwhelming evidence in the record showing that the predominant purpose of the Monument was for secular commemoration. The Monument's groundbreaking was a predominantly secular affair that also included the groundbreaking of the National Defense Highway. (ECF No. 83-25, at 2–3). Additionally, although the construction of a cross can be for a religious purpose, in the period immediately following World War I, it could also be motivated by "the sea of crosses" marking graves of American servicemen who died overseas. (ECF No. 83-5, at 14); *cf. Davenport*, 637 F.3d at 1118. The Monument's secular commemorative purpose is reinforced by the plaque, the American Legion's seal, and the words "valor," "endurance," "courage," and "devotion" written on it. None of these features contains any religious reference. In short, the record amply demonstrates that the construction and maintenance of the Monument "was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers." *Buono*, 559 U.S. at 715 (plurality opinion).

The ownership, maintenance, and display of the Monument by the Commission thus easily satisfies the purpose prong of the *Lemon* test.

2. Primary Effect

Lemon's second prong requires the court to determine if the challenged display's "principal or primary effect is to advance or inhibit religion." *Lambeth*, 407 F.3d at 270. The primary question is "whether an informed, reasonable observer would view the display as an endorsement of religion." *Id.* at 272. "[T]he reasonable observer is aware of the purpose, context, and history of the symbol at issue." *Hewett*, 29 F.Supp.3d at 613 (emphasis in original)(quoting *Davenport*, 637 F.3d at 1119). "The inquiry is not 'whether there is any person who could find an endorsement of religion, whether some people may be offended by the display, or whether some reasonable person might think [the government] endorses religion.'"[8] *Id.* at 613 (emphases in original) (quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgment)). The Ninth Circuit noted that in determining the effect of symbols such as the Monument, courts "must consider fine-grained, factually specific features of the Memorial, including the meaning or meanings of the Latin cross[,] . . . the Memorial's history, its secularizing elements, its physical setting, and the way the Memorial is used." *Trunk*, 629 F.3d at 1110. "Secular elements, coupled with the history and physical setting of a monument or display, can – but do not always – transform sectarian symbols that otherwise would convey a message of government

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[8] It is for this reason that the parties' inclusion of individuals' reactions to the Monument is not particularly relevant or helpful for the reasonable person analysis.

endorsement of a particular religion." *Id.* at 1117. The Ninth Circuit's framework provides a helpful approach to assessing the effect of the Monument, which is similar, but not identical, to the memorial at issue in Trunk.

Plaintiffs argue that the Monument endorses religion because, "as a Christian cross, it is inherently religious." (ECF No. 90, at 56). Additionally, Plaintiffs assert that the prominence of the Monument on the traffic island and relative isolation from the other memorials in Veterans Memorial Park enhance its endorsement of religion. Finally, Plaintiffs argue that the history and use of the Monument "deepens its religious message." (ECF No. 80-1, at 43). Defendants counter that the Monument contains numerous secular commemorative aspects that would indicate to the reasonable observer that its purpose is commemorative rather than religious. (ECF No. 83-1, at 55). Defendants also contend that the location of the Monument within Veterans Memorial Park further supports its secular effect. (*Id.* at 56–57). Defendants also argue that the historical use of the Monument for veterans' commemorative events strengthens its secular effect.

Plaintiffs cite multiple cases addressing a cross memorial on public land to support the proposition that "courts have been virtually unanimous in concluding that the government's display of a cross on public property unconstitutionally endorses and advances Christianity." (ECF No. 80-1, at 37). This assertion ignores the key factual distinctions between the cases Plaintiffs cite and the Monument. In *Trunk*, for example, the history and setting of the cross memorial were overtly religious. The cross in Trunk

sat from 1913 until the 1990s as an unadorned cross without "any physical indication that it was a memorial." *Trunk*, 629 F.3d at 1102. Rather than hosting annual commemorative events on Memorial Day and Veterans Day, the *Trunk* cross hosted religious Easter services and only a "few scattered [veterans] memorial services before the 1990s." *Id.* Throughout its history, the *Trunk* cross "functioned as a holy object, symbol of Christianity, and a place of religious observance." *Id.* at 1120. The Ninth Circuit suggested that the *Trunk* cross was repurposed primarily as a war memorial partly in response to litigation. *Id.* at 1102. The cross memorials at issue in other cases were similarly imbued with long-standing and explicit religious histories. *See, e.g.*, *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (cross was initially erected for religious purposes but later deemed to be a "memorial of veterans to all wars"); *Gonzales v. North Tp. Of Lake Cnty., Ind.*, 4 F.3d 1412 (7th Cir. 1993) (lone crucifix with no secular effect other than "landmark status"); *Am. Civil Liberties Union of Ga. v. Rabun Cnty.*, 698 F.2d 1098 (11th Cir. 1983) (cross was dedicated on Easter and only secular purpose was tourism). Conversely, the Monument contains secular elements on its face (the plaque; the American Legion Seal; the words "valor," "endurance," "courage," "devotion"), has functioned expressly and overtly as a war memorial for its entire history, and sits amidst other secular memorials in Veterans Memorial Park. Although the record indicates that there were three isolated religious services held at the Monument, the predominant and nearly exclusive use of the Monument has been for annual commemorative

events held on Memorial Day and Veterans Day. (*See* ECF Nos. 80-51; 83-60, at 18).[9] In light of this history and context, of which a reasonable observer would be aware, the Monument "evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten." *Buono*, 559 U.S. at 721 (plurality opinion). The evocation of foreign graves is particularly relevant here because, unlike crosses challenged in other cases, the Monument explicitly memorializes forty-nine servicemen who died in Europe during World War I, and the "cross developed into a central symbol of the American overseas cemetery" during and following World War I. (*See* ECF Nos. 83-5, at 16–17; 83-21).

Controlling Fourth Circuit precedent also supports Defendants' assertion that the Monument does not have the effect of endorsing religion. The Fourth Circuit has addressed other passive displays of alleged religious significance in *Lambeth and Smith v. Cnty. of Albemarle, Va.*, 895 F.2d 953 (4th Cir. 1990). In *Lambeth*, the Fourth Circuit held that the inscription of the motto "In God We Trust" on the county government center did not violate the Establishment Clause because a reasonable observer would not "fairly understand the purpose of the message 'in its

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[9] Plaintiffs refer to invocations and benedictions at these events as "prayers." Such activities at public ceremonies, outside of the public school context, generally do not violate the Establishment Clause. *Town of Greece, N.Y. v. Galloway*, 134 S.Ct. 1811 (2014); *Newdow v. Roberts*, 603 F.3d 1002, 1019–21 (D.C.Cir. 2010) (*Kavanaugh, J.*, concurring in the judgment), cert. *denied*, 131 S.Ct. 2441 (2011).

particular physical setting' to impermissibly advance or endorse religion." *Lambeth*, 407 F.3d at 272 (quoting Cnty. Of Allegheny, 492 U.S. at 598–600). In *Smith*, the Fourth Circuit held that a crèche scene on the front lawn of the county office building did violate the Establishment Clause because it "was not associated with any secular symbols or artifacts" other than a small disclaimer that the display was not sponsored by the government, but rather by the Charlottesville Jaycees." *Smith*, 895 F.2d at 958. Here, the Monument is surrounded by secular symbols of commemoration throughout Veterans Memorial Park. (ECF No. 83-3). The cross itself is adorned with prominent secular symbols. (ECF No. 83-2). In addition, rather than being placed prominently in front of a governmental building, the Monument is on a highway median as part of a larger park that has become the "focus of the County's remembrance of its veterans and war dead." (ECF No. 83-8, at 2). Within the context of its long history and the setting of Veterans Memorial Park, a reasonable observer would not view the Monument as having the effect of impermissibly endorsing religion.

3. Excessive Entanglement

Lemon's third prong requires courts to assess whether "the challenged display has created an 'excessive entanglement' between government and religion." *Lambeth*, 407 F.3d at 272–73. The Fourth Circuit has noted that "[t]he kind of excessive entanglement of government and religion precluded by *Lemon* is characterized by 'comprehensive, discriminating, and continuing state surveillance' of religious exercise." *Id.* at 273 (quoting *Lemon*, 403 U.S. at 619). Considering the inscription of "In God

We Trust" in the county government center, the Fourth Circuit held that it was not excessive entanglement because the display did "not require pervasive monitoring or other maintenance by public authorities." *Id.* Here, Plaintiffs argue that the Commission's "expenditure of funds to maintain and light" the Monument excessively entangles government and religion.[10] (ECF No. 80-1, at 53). However, "entanglement between church and state becomes constitutionally excessive only when it has the effect of advancing or inhibiting religion." Hewett, 29 F.Supp.3d at 618 (citations and internal quotation marks omitted). Accordingly, courts often view *Lemon*'s third prong "as an aspect of the second." *Id.* Here, for reasons discussed in the preceding section, the Commission's display and maintenance of the Monument is not an endorsement of religion. The Monument and Veterans Memorial Park are secular war memorials that host numerous commemorative events. The Monument is located on a median of a busy highway interchange. The fact that the Commission has spent money on maintenance and upkeep of the Monument and surrounding park does not represent unconstitutional entanglement because the Monument itself is not a governmental endorsement of religion. The provision of maintenance and repairs for the Monument and the

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[10] Plaintiffs also argue that the existence of the cross creates "religion-based political division" in violation of *Lemon*'s third prong. (ECF No. 80-1, at 52). The Fourth Circuit has indicated, however, that this "political divisiveness rubric" is limited to assessing government funding of religious schools, and "is thus inapplicable to the circumstances of this case." *Lambeth*, 407 F.3d at 273.

median does not constitute "continued and repeated government involvement with religion." *Lambeth*, 407 F.3d at 273 (emphasis added). Rather, as discussed in relation to *Lemon*'s purpose prong, the Commission undertakes maintenance of the Monument and surrounding land for traffic safety and commemorative purposes. In short, the Commission's maintenance of a war memorial on a highway median does not implicate any of the evils against which *Lemon's* third prong protects.

C. *Van Orden*

Despite continued judicial use of the *Lemon* test to assess the constitutionality of such displays, a 2005 plurality of the Supreme Court determined that the *Lemon* test "is not useful in dealing with [such] passive monument[s]." *Van Orden*, 545 U.S. at 686 (plurality opinion).[11] The Fourth Circuit applied the "legal judgment" test from Justice Breyer's *Van Orden* concurrence in holding that reciting the Pledge of Allegiance in public school did not violate the Establishment Clause. *Myers*, 418 F.3d at 402. The Ninth Circuit applied a hybrid of *Lemon* and *Van Orden* in determining that the cross in *Trunk* was unconstitutional. *Trunk*, 629 F.3d at 1107.

Here, for many of the same reasons discussed in the application of the *Lemon* test, the Monument does not

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[11] Justice Breyer noted that *Van Orden* was most applicable in "borderline cases" because applying *Lemon* would be difficult. *Van Orden*, 545 U.S. at 700 (Breyer, J. concurring). The facts, history, and context of the Monument do not present a particularly difficult "borderline" *Lemon* analysis. A brief discussion of *Van Orden* is warranted, however, due to the uncertain status of Establishment Clause jurisprudence.

violate the Establishment Clause under *Van Orden's* legal judgment test. As in *Lemon*, it is essential to consider the context and history of the display to determine its constitutionality. *See Van Orden*, 545 U.S. at 701 (Breyer, J., concurring). The Monument was constructed and financed by the American Legion and a private group of citizens whose purpose was to remember and honor Prince George's County's fallen soldiers. *See Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) (noting the secular purpose of the display's founders). The American Legion's seal is "displayed on the [Monument], prominently acknowledg[ing] that the [American Legion] donated the display, a factor which, though not sufficient, thereby further distances" the Commission from any potential religious aspect of the Monument. *Id.* Furthermore, the Monument is located in Veterans Memorial Park and is surrounded by other war memorials and secular monuments. (ECF No. 83-3); *see Van Orden*, 545 U.S. at 702 (Breyer, J., concurring) ("The physical setting of the monument, moreover, suggests little or nothing of the sacred."). Much like the Ten Commandments display in *Van Orden*, the location of the Monument "does not readily lend itself to meditation or any other religious activity." *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring). Rather, the location among the other monuments of Veterans Memorial Park underscores its secular and commemorative nature. In addition, the Monument has gone unchallenged for decades. *See id.* at 702–03 (discussing how the fact that the monument existed for 40 years before a legal challenge shows that "few individuals . . . [were] likely to have understood the monument as amounting, in any significantly detrimental way, to a government

effort" to promote or endorse religion). Finally, the Monument has been used almost exclusively as a site to commemorate veterans on secular patriotic holidays for its entire history. (ECF Nos. 80-41; 83-1, at 35–36; 83-9, at 6; 83-11, at 9–11; 83-60, at 18). As the Ninth Circuit acknowledged in *Trunk*, "[t]he Ten Commandments monuments at issue in [*Van Orden*] passed muster in part because they were not used as religious objects — they simply adorned the grounds of their respective government buildings in the company of other monuments." *Trunk*, 629 F.3d at 1120. Conversely, the cross in *Trunk* had a long history of hosting religious Easter services and had "no physical indication of any secular purpose" for much of its history, "during which it served primarily as a site of religious observance." *Id.* at 1121.

For the foregoing reasons, the Monument satisfies both the *Lemon* test and the "legal judgment" test from *Van Orden*.

D. Motions for Leave to File *Amici Curie* Memoranda

Also pending are three motions for leave to file a memorandum as *amicus curiae*. One motion was filed in support of Defendants on September 15, 2015 by the same eleven individuals and the Veterans of Foreign Wars of the United States who filed in 2014, and the motion contains a memorandum that is "essentially identical to the original memorandum" previously filed. (ECF No. 94). On October 1, 2015, two motions in support of Plaintiffs were filed by the Center for Inquiry Responses and CAIR. (ECF Nos. 95; 96). Memoranda are not attached to these two motions for

leave. As the undersigned discussed in a prior memorandum opinion:

> There is no Federal Rule of Civil Procedure that applies to motions for leave to appear as amicus curiae in a federal district court. District courts therefore have discretion whether to grant or deny such leave and often look for guidance to Rule 29 of the Federal Rules of Appellate Procedure, which applies to amicus briefs at the federal appeals level. *See, e.g.*, *Jin v. Ministry of State Sec.*, 557 F.Supp.2d 131, 136 (D.D.C. 2008); *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F.Supp.2d 720, 728 (D.Md. 1996); *Washington Gas Light Co. v. Prince George's County Council*, Civ. No. DCK-08-0967, 2012 WL 832756, at *3 (D.Md. Mar. 9, 2012). Rule 29 indicates that amici should state "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed.R.App.P. 29(b)(2). As noted by Judge Davis in Bryant, "[t]he aid of *amici curiae* has been allowed at the trial level where they provide helpful analysis of the law, they have a special interest in the subject matter of the suit, or existing counsel is in need of assistance." *Bryant*, 923 F.Supp.2d at 728 (citing *Waste Mgmt. of Pa., Inc. v. City of New York*, 162 F.R.D. 34, 36 (M.D.Pa. 1995)).

(ECF No. 46, at 5–6). At this point, the issues have been comprehensively and fully briefed by all parties. Although the prospective *amici* have demonstrated a special interest in the outcome of the suit, there are no indications that the proposed memoranda would

provide helpful legal analysis beyond the thorough job done by the parties' counsel. Accordingly, the motions filed by prospective *amici curiae* will be denied and the court will not consider any documents filed by movants.

IV. Conclusion

For the foregoing reasons, the motion for summary judgment filed by Plaintiffs American Humanist Association, et al. will be denied. The motions for summary judgment filed by Defendant Maryland-National Capital Park and Planning Commission and Intervenor-Defendants American Legion, et al. will be granted. The motions for leave to file memoranda of *amici curiae* will be denied. An appropriate declaration will be entered. A separate order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge

APPENDIX C

PUBLISHED

FILED: March 1, 2018
AMENDED: March 2, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2597
(8:14-cv-00550-DKC)

AMERICAN HUMANIST ASSOCIATION; STEVEN LOWE; FRED EDWORDS; BISHOP MCNEILL,

Plaintiffs – Appellants,

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Defendant – Appellee,

THE AMERICAN LEGION; THE AMERICAN LEGION DEPARTMENT OF MARYLAND; THE AMERICAN LEGION COLMAR MANOR POST 131,

Intervenors/Defendants – Appellees,

FREEDOM FROM RELIGION FOUNDATION; CENTER FOR INQUIRY

Amici Supporting Appellant

THE BECKETT FUND FOR RELIGIOUS LIBERTY; JOE MANCHIN; DOUG COLLINS; VICKY HARTZLER; JODY HICE; EVAN JENKINS; JIM JORDAN; MARK MEADOWS; ALEX MOONEY; STATE OF WEST VIRGINIA; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF HAWAII; STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS; STATE OF KENTUCKY; STATE OF LOUISIANA; STATE OF MICHIGAN; STATE OF MONTANA; STATE OF NEVADA; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF RHODE ISLAND; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TEXAS; STATE OF UTAH; STATE OF VIRGINIA; STATE OF WISCONSIN

Amici Supporting Appellee

FOUNDATION FOR MORAL LAW

Amicus Supporting Rehearing Petition

ORDER

On a requested poll of the court on appellees' petitions for rehearing en banc, a majority of active judges voted to deny rehearing en banc. Judge Motz, Judge Duncan, Judge Keenan, Judge Wynn, Judge Diaz, Judge Floyd, Judge Thacker, and Judge Harris voted to deny rehearing en banc. Chief Judge Gregory,

Judge Wilkinson, Judge Niemeyer, Judge Traxler, Judge King, and Judge Agee voted to grant rehearing en banc.

The petitions for rehearing en banc are denied.

Judge Wynn filed a concurring opinion, and Chief Judge Gregory, Judge Wilkinson, and Judge Niemeyer filed dissenting opinions.

Entered at the direction of Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

WYNN, Circuit Judge, voting to Deny the Petition to Rehear:

In seeking rehearing of this case en banc, Petitioner Maryland-National Capital Park & Planning Commission, a state entity (the "Commission"), again asks this Court to hold that Maryland's ownership and maintenance of the Bladensburg Cross—a 40-foot tall Latin cross erected at an intersection in Prince George's County—*does not* have the "principal or primary effect" of advancing the Christian faith. Appellee's Pet. for Reh'g En Banc at 12. Rather, according to the Commission, this Court should conclude that the Bladensburg Cross has lost its predominantly sectarian meaning, to the extent that it ever had any such meaning, and now stands as a symbol of the soldiers who died on the field of battle in World War I.

But the Latin cross has for centuries been widely recognized as "the pre-eminent symbol of Christianity."[1] Nothing in the First Amendment

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[1] *Trunk v. City of San Diego*, 629 F.3d 1099, 1110 (9th Cir. 2011); *see also, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) ("Symbolism is a primitive but effective way of communicating ideas. The use of an emblem . . . to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. . . . [T]he church speaks through the Cross, the Crucifix, the altar and shrine, and clerical reiment."); *Salazar v. Buono*, 559 U.S. 700, 747 (2010) (Stevens, J., dissenting) ("We have recognized the significance of the Latin cross as a sectarian symbol, and no participant in this litigation denies that the cross bears that social meaning." (citing, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring in part and concurring in judgment) (expressing concern because "the cross is an especially potent sectarian symbol which stood unattended in close proximity to official

empowers the judiciary to conclude that the freestanding Latin cross has been divested of this predominately sectarian meaning.

Our holding that the State's ongoing ownership and maintenance of the Bladensburg Cross violated the Establishment Clause recognizes that to hold otherwise would require this Court to accept the Commission's conclusion that the Latin cross *does not* have the "principal or primary effect" of advancing the Christian faith. To give the judiciary the power to prescribe and proscribe the meaning of an unadorned, traditionally religious symbol like the Latin cross would infringe on intensely personal and sacred questions of religious meaning and belief.[2] Such governmental prescription of religious belief would serve only to "degrade religion"—one of the principal outcomes the Framers of the Religion Clauses sought to forestall. *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

The First Amendment provides that the government "shall make no law respecting an establishment of religion, or prohibiting the free

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government buildings"); *id.* at 792 (Souter, J., concurring in part and concurring in judgment) ("[T]he Latin cross . . . is the principal symbol of Christianity around the world."); *id.* at 798 n.3 (Stevens, J., dissenting) ("[T]he Latin cross is identifiable as a symbol of a particular religion, that of Christianity; and, further, as a symbol of particular denominations within Christianity.")).

[2] According to recent polling, adults who identify as adherents of Christianity comprise approximately 75% of the United States population. *E.g.*, Frank Newport, *Percentage of Christians in U.S. Drifting Down, but Still High*, Gallup News (Dec. 24, 2015), http://news.gallup.com/poll/187955/percentage-christians-drifting-down-high.aspx.

exercise thereof." U.S. Const. amend. I. Although "tension inevitably exists between the Free Exercise and the Establishment Clauses," *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973), both Religion Clauses serve at least one common purpose: the prevention of governmental interference in matters of faith.

The Free Exercise Clause, in particular, protects "first and foremost the right to believe and profess whatever religious doctrine one desires." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990), *superseded on other grounds by statute*, 42 U.S.C. §§ 2000bb-1; *see also City of Boerne v. Flores*, 521 U.S. 507, 550 (1997) (O'Connor, J., dissenting) ("[T]he historical record indicates that [the Framers] believed that the Constitution affirmatively protects religious free exercise and that it limits the government's ability to intrude on religious practice."). Put differently, the Free Exercise Clause endows individuals and religious institutions with the "power to decide for themselves, free from state interference, matters . . . of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N.A.*, 344 U.S. 94, 116 (1952). The clause, therefore, amounts to an "unflinching pledge to allow our citizenry to explore diverse religious beliefs in accordance with the dictates of their conscience." *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984). To that end, the Free Exercise Clause prohibits the government, and the judiciary in particular, from entertaining, much less resolving, questions that turn on issues of religious doctrine, practice, and belief. *See, e.g., Hosanna Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 188 (2012)

(holding that the Free Exercise Clause prohibits courts from resolving claims "concerning the employment relationship between a religious institution and its ministers"); *Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich*, 426 U.S. 696, 720 (1976) (holding that the "First Amendment commits exclusively to the highest ecclesiastical tribunals . . . the resolution of quintessentially religious controversies").

The Establishment Clause likewise protects against governmental interference in religious matters. As the Supreme Court has recognized, the "first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government *and to degrade religion*." *Engel*, 370 U.S. at 431 (emphasis added); *Catholic High Sch. Ass'n of Archdiocese of N.Y. v. Culvert*, 753 F. 2d 1161, 1162–63 (2d Cir. 1985) ("[The Religion Clauses] must be constantly manned, the Founding Fathers believed, lest there be a union between church and state that will first degrade and eventually destroy *both*." (emphasis added)). "The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Engel*, 370 U.S. at 431–32. In other words, the Establishment Clause protects "not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree . . . the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government."

School of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 258 (1963) (Brennan, J., concurring).

The Religion Clauses' animating concern with governmental intrusion on and degradation of religious belief stems from the colonists' experience and unease with the consequences of state control over religious institutions and beliefs. The Puritans fled England to escape the monarchy's prescription of tenets of belief and modes of worship. *Hosanna-Tabor*, 565 U.S. at 182–83. And other settlers sought to escape what they saw as "the corruptive influence of secular statism on religious purity." *Brandon v. Bd. of Educ. of Guilderland Cent. Sch. Dist.*, 635 F.2d 971, 974 (2d Cir. 1980). As James Madison, the principal drafter of the Religion Clauses, explained, "experience" revealed "that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 7 (1785), *in* II Writings of James Madison 187 (1901), and quoted in *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 67 (1947) [hereinafter *Remonstrance*].

To allow this Court to circumscribe the Bladensburg Cross's meaning and power, as the Commission and its amici request, would empower this Court to diminish the Latin cross's many years of accrued religious symbolism, and thereby amount to the state degradation of religion that the Framers feared and sought to proscribe. Indeed, were this Court to accept that the Latin cross's predominantly sectarian meaning could be overcome by a plaque, a small secular symbol, and four engraved words, as the Commission maintains, we would necessarily grant

the government—and the judiciary, in particular—broad latitude to define and shape religious belief and meaning. Surely, the Constitution does not contemplate endowing the government with such extraordinary power to determine and prescribe individual citizens' religious beliefs and religious communities' joint understandings, appreciations, and teachings. *See, e.g., West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632–33 (1943) ("A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.").

Importantly, this is not a case in which a religious symbol or text is displayed as part of historical presentation that has a predominately secular purpose. *See Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring) (surrounding context revealed Ten Commandments display conveyed primarily historical and moral meaning). Nor is it a case in which the government is displaying a religious symbol as a "historical artifact," thus permitting each individual to imbue the symbol with her own meaning. *See Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 238–42 (2d Cir. 2014) (surrounding context of display in 9/11 museum of "cross-shaped artifact" that naturally appeared in wreckage of the World Trade Center demonstrated that artifact was displayed, not for a religious purpose, but to "provid[e] accurate historical insight into the various means by which people tried to cope with the devastation of the September 11 attacks"). Rather, it is a case in which the Commission and its religiously affiliated amici ask the judiciary to strip a long-recognized, "pre-eminent symbol" of a religion of its predominantly sectarian

meaning. *See, e.g., Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1122–23 (10th Cir. 2010) (concluding Latin crosses that state erected to commemorate deaths of law enforcement officers, otherwise devoid of context, retained predominantly religious meaning, notwithstanding state's claim that cross had "become a secular symbol of death").

Otherwise put, to accept the Commission's assertion that the Latin cross erected at the Bladensburg intersection does not convey a predominantly sectarian message would prohibit the ability of those who raised the symbol to prominence to continue to safeguard and define its primary meaning. Indeed, sanctioning a governmental body's attempt to imbue a traditionally religious symbol, like the Latin cross, with secular meaning poses the risk that "religion may be compromised as political figures reshape the religion's beliefs [or symbols] for their own purposes." *Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring). And permitting government to serve as the arbiter of religious belief and meaning would "weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits." *See Remonstrance* ¶ 6.

If the Latin cross here at issue is more overtly secular than sectarian, as the Commission and amici maintain, then their concern that altering or removing the monument would be "hostile" to religious beliefs is puzzling. If, on the other hand, the Commission and its amici's concern that removing the Bladensburg Cross would amount to judicial hostility towards

religion stems from the fact that the Latin cross continues to stand in their minds as a potent religious symbol, then permitting the cross to stand on governmental property would diminish the power of that symbol, as such a resolution entails a judicial finding that the cross is *not* a predominantly religious symbol. Perhaps De Tocqueville put it best in his 1840 reflections upon democracy in the United States, in which his travels through our country revealed that "the spirit of religion and the spirit of freedom . . . were intimately united":

> [W]hen a religion contracts an alliance [with government], . . . it commits the same error as a man who should sacrifice his future to his present welfare; and in obtaining a power to which it has no claim, it risks that authority which is rightfully its own. When a religion founds its empire upon the desire of immortality which lives in every human heart, it may aspire to universal dominion; but when it connects itself with a government, it must necessarily adopt maxims which are only applicable to certain nations. Thus, in forming an alliance with a political power, religion augments its authority over a few, and forfeits the hope of reigning over all.
>
> As long as a religion rests upon those sentiments which are the consolation of all affliction, it may attract the affections of mankind. But if it be mixed up with the bitter passions of the world, it may be constrained to defend allies whom its interests, and not the principle of love, have given to it.

Alexis de Tocqueville, *Democracy in America* vol. I, ch. XVII, pt. III (Henry Reeve ed. 2006).

We should be wary of allowing the government—however innocuous such an allowance may initially seem—to define the principal meaning of a symbol that otherwise would be defined by those individuals to whom it brings meaning. "In America, religion . . . restricts itself to its own resources, but of those none can deprive it: its circle is limited to certain principles, but those principles are entirely its own, and under its undisputed control." *Id.* As long as that control endures, "religion is sustained by those feelings, propensities, and passions which are found to occur under the same forms, at all the different periods of history, [and therefore] may defy the efforts of time; or at least . . . can only be destroyed by another religion. But when religion clings to the interests of the world, it becomes almost as fragile a thing as the powers of earth." *Id.*

Sentiments aside, the majority opinion is a faithful application of the law.

GREGORY, Chief Judge, dissenting from the denial of rehearing en banc, in which Judge Wilkinson and Judge Agee join:

I would grant rehearing en banc for the reasons expressed in my dissent to the panel decision. *See Am. Humanist Ass'n v. Maryland–National Capital Park & Planning Comm'n*, 874 F.3d 195, 215–22 (4th Cir. 2017) (Gregory, C.J., concurring in part and dissenting in part). I do not write to discuss further my legal analysis and reasoning. Instead, I join Judge Wilkinson's eloquent dissent from the denial of rehearing en banc and give these few thoughts.

Unlike the sprawling acres of Arlington National Cemetery, Veterans Memorial Park has a single monument on a tiny plot of land that honors local soldiers who died defending their country in World War I. But like the lives of the fallen heroes it honors, what the Park lacks in length it makes up in height. Nearly a century ago, Maryland citizens, out of deep respect and gratitude, took on the daunting task of erecting a monument to mirror the measure of individual devotion and sacrifice these heroes had so nobly advanced. The panel majority says their effort violates the Constitution the soldiers fought to defend. I, respectfully, think otherwise. But wherever one's views fall on this matter, I am certain that it raises an important question worthy of the full Court's review.

WILKINSON, Circuit Judge, with whom Chief Judge GREGORY and Judge AGEE, join, dissenting from the denial of rehearing en banc:

I would grant rehearing en banc for the reasons expressed in Chief Judge Gregory's dissent to the panel decision. *See Am. Humanist Ass'n v. Maryland–National Capital Park & Planning Comm'n*, 874 F.3d 195, 215–222 (4th Cir. 2017) (Gregory, C.J., concurring in part and dissenting in part). I add only these few thoughts.

Forty-nine names appear on the plaque at the base of the Great War memorial in Prince George's County. Aggregate figures do not do justice to individual soldiers. Each name marks the tragedy of a life lost before its time. Each death marks a worthy sacrifice.

We honor those Americans who died serving their country in different ways. Families respect their fallen sons and daughters in pictures, prayers, and memory. Their country honors them in ceremony, as at Memorial Day, but more often with quietude.

The dead cannot speak for themselves. But may the living hear their silence. We should take care not to traverse too casually the line that separates us from our ancestors and that will soon enough separate us from our descendants. The present has many good ways of imprinting its values and sensibilities upon society. But to roil needlessly the dead with the controversies of the living does not pay their deeds or their time respect.

This memorial and this cross have stood for almost one full century. Life and change flow by the small park in the form of impatient cars and trucks. That is disturbance enough. Veterans Memorial Park may

not be Arlington National Cemetery, but it is the next thing to it. I would let the cross remain and let those honored rest in peace.

NIEMEYER, Circuit Judge, dissenting from the denial of rehearing en banc:

Although the Establishment Clause allows monuments that include religious symbols or texts to stand on public lands, *see Van Orden v. Perry*, 545 U.S. 677 (2005), the majority rules that an almost 100-year old monument commemorating soldiers from Prince George's County who died in World War I must be removed because it is shaped in a large Celtic cross. The holding not only violates *Van Orden*, it also needlessly puts at risk hundreds of monuments with similar symbols standing on public grounds across the country, such as those in nearby Arlington National Cemetery, where crosses of comparable size stand in commemoration of fallen soldiers. Because this ruling has such far-reaching and unnecessary consequences, it should be reheard by our court en banc, and I dissent from the vote not to do so.

The mothers of soldiers who died during World War I and other private citizens in Prince George's County, Maryland, erected a memorial almost 100 years ago commemorating the soldiers' service to the Nation. The memorial, which consists of a large concrete Celtic cross on a pedestal, includes on four sides the words "Valor," "Endurance," "Courage," and "Devotion" and a plaque stating: "This Memorial Cross Dedicated to the Heroes of Prince George's County, Maryland Who Lost Their Lives in the Great War for the Liberty of the World." The plaque also includes the names of the 49 men who are commemorated by the monument and a quote from President Wilson, stating, "The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives." The monument's

use of the cross shape mirrors the custom in Europe during World War I where "the Cross became the principal grave marker" in cemeteries where soldiers were buried.

The monument at issue in this case stands in Veterans Memorial Park and is surrounded by numerous other monuments commemorating those who died in the Nation's conflicts, including a World War II Honor Scroll, a Pearl Harbor Memorial, a Korea Vietnam Veterans Memorial, a September 11 Memorial Garden, a large Battle of Bladensburg Memorial, and two 38-foot-tall statutes of soldiers, one British and one American, facing each other across a bridge. Some of these monuments are as tall as the monument at issue in this case. Moreover, within 40 miles of the monument are other similar monuments commemorating lost soldiers and incorporating Christian symbols, such as the Wayside Cross in Towson, Maryland, the Victory Cross in Baltimore, and the Argonne Cross and the Canadian Cross of Sacrifice in Arlington National Cemetery.

In 1961, the property on which the monument was erected was deeded to the Maryland-National Capital Park and Planning Commission because it had become a highway safety issue due to the monument's location in the median of the busy intersection of U.S. Route 1 and Maryland Route 450. It is now maintained by the Commission. Since 1961, however, the monument has continued to be used during relevant holidays to commemorate those who died in war.

Until this action was filed by persons who claim to be offended by the presence of the monument, no

complaint had been made about its presence or its use of a Christian symbol.

The panel, in a 2-1 decision, will now have the monument removed or destroyed because, as it concludes, its presence on public land amounts to a violation of the Establishment Clause, although no Supreme Court case has ever held that the Establishment Clause prohibits such monuments. Indeed, it has held to the contrary — that "the Establishment Clause of the First Amendment *allows* the display" of monuments like the one here. *Van Orden*, 545 U.S. at 681 (emphasis added) (plurality opinion) (holding that the Establishment Clause allows a large granite monument inscribed with the Ten Commandments to stand on the grounds of the Texas State Capitol); *id.* at 700–01, 703–04 (Breyer, J., concurring in the judgment). The panel opinion seeks to distinguish *Van Orden* on the ground that the cross as a symbol "differs from other religious monuments, such as the Ten Commandments" because the Ten Commandments is "well known as being tied to our Nation's history and government" and because, unlike the monument at issue in *Van Orden*, the monument here is "conspicuously displayed at a busy intersection." The panel further rationalizes that when crosses are ordinarily used to commemorate fallen soldiers, such as in Arlington National Cemetery, they "are much smaller than the 40-foot tall monolith at issue here." The opinion, however, fails to recognize that there are similarly sized monuments incorporating crosses in the Arlington National Cemetery — indeed, also elsewhere nearby. The panel opinion directs the district court, which had held that the Establishment Clause was not violated by the

monument, to consider on remand whether the arms of the cross should be "remov[ed]" or the cross entirely "raz[ed]," or other "arrangements [could be made] that would not offend the Constitution."

The Supreme Court has adopted numerous tests for deciding Establishment Clause cases, and it debated in *Van Orden* which might apply in assessing monuments on public lands that contain religious symbols. 545 U.S. 683–88 (plurality opinion) (canvassing the various tests that have been applied in varying circumstances); *id.* at 698 (Breyer, J., concurring in the judgment) (noting that there is "no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible") (internal quotation marks and citation omitted). Ultimately, the Court, in determining whether "passive monuments" on public grounds that include religious symbols violate the Establishment Clause, justified its decision "both by the nature of the monument and by our Nation's history." *Id.* at 686 (plurality opinion); *see also id.* at 703–04 (Breyer, J., concurring in the judgment) ("I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves"). Specifically, the Court held that "a large granite monument bearing the text of the Ten Commandments located on the grounds of the Texas State Capitol" was allowed by the Establishment Clause, despite the Court's recognition that the Ten Commandments' text "has a religious message." 545 U.S. at 700 (Breyer, J., concurring in the judgment); *see also id.* at 690 (plurality opinion). The Court's conclusion was based on the following observations

that it made about the monument at issue there: (1) that the text on the monument conveyed both a "religious message" and a "secular moral message"; (2) that the monument has stood in a secular setting on Capitol grounds for some 40 years; (3) that the monument was donated by a private, "primarily secular" organization to highlight the Ten Commandments' role in "shaping civil morality"; (4) that the monument's physical setting "suggest[ed] little or nothing of the sacred," as it sat "in a large park containing 17 monuments and 21 historical markers"; and (5) that over a period of 40 years, the monument "went unchallenged" until the present case. *Id.* at 701–02 (Breyer, J., concurring in the judgment); *see also id.* at 681, 688–92 (plurality opinion).

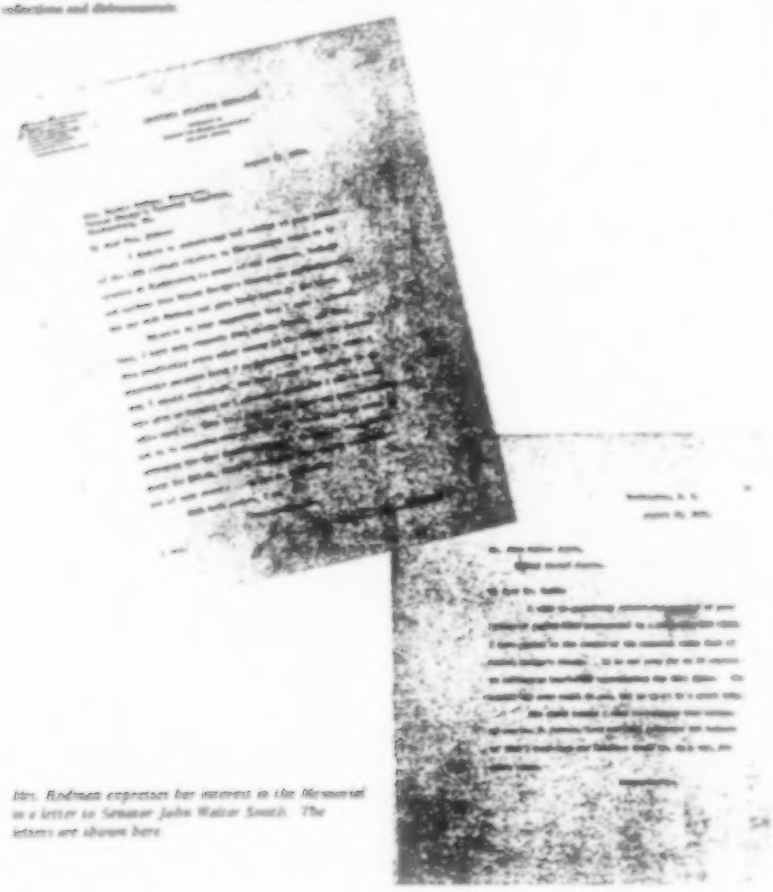
It strains established judicial analysis to conclude that *Van Orden* does not allow the monument in this case to stand as a secular memorial to the lives of soldiers lost during war in service of the Nation. The panel decision not only wrongly distinguishes *Van Orden*, but, in doing so, also offends the monument's commemoration of those soldiers' sacrifice. Moreover, it puts at risk hundreds, and perhaps thousands, of similar monuments. The Establishment Clause was never intended to be so interpreted, and the Supreme Court has never so interpreted it.

Our vote not to rehear this case en banc is an unfortunate misstep.

APPENDIX D

On November 19, 1930 the last payment to the S.H. Kress Company of $27.64 closing out the books of Mrs. Nerman. The underwriters had earned $1523.16.

Mrs. Rodman became treasurer but the records are not available as to the collections and disbursements.



Mrs. Rodman expresses her interest in the Monument in a letter to Senator John Walter Smith. The letters are shown here

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND SOUTHERN DIVISION

AMERICAN HUMANIST ASSOCIATION, ET AL.	*	
Plaintiffs	*	
	*	
vs.	*	**Civil No. 8:14-cv-00550-DKC**
	*	
	*	
MARYLAND-NATIONAL CAPITAL PARK & PLANNING COMMISSION, ET AL.	*	
Defendants	*	

AFFIDAVIT OF EDWARD DAY IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT, MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION'S, CROSS-MOTION FOR SUMMARY JUDGMENT

I, Edward Day, do hereby solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true, and state:

1. I am an adult over the age of 18 years and competent to testify to the matters stated herein.

2. I am authorized by the Maryland-National Capital Park and Planning Commission ("Commission") to make this affidavit.

3. I am employed with the Commission as the Acting Assistant Parks Division Chief for its Natural and Historical Resources Division within its Prince George's County Department of Parks and Recreation. I have been employed with the Commission since December 1994 and have served in this role since May 2014.

4. I am also the Director of the Commission's Riversdale House Museum which is also located in Prince George's County and have held this position since December 1994.

5. I have a bachelor's degree in organizational management and minor in history from the University of Maryland. I have also trained at the University of Maryland, Graduate School of Maryland Architecture, Planning and Preservation.

6. In my position as Acting Division Chief and Museum Director, I customarily research and document the archeological and historical significance of Commission properties, including those located in Bladensburg, Maryland.

7. I also manage the construction and installation of new monuments commemorating various events of national and local historical significance.

8. In the course of my employment with the Commission I have, in fact, obtained information pertaining to historic significance of the War of 1812,

including the Battle of Bladensburg.

9. In the course of my employment with the Commission, I have also, in fact, obtained information pertaining to historic significance of World War I, particularly as it relates to the use of military weaponry and casualties.

10. I have acquired information regarding the Bladensburg World War I Memorial and the other Veterans Memorials located at Veteran's Memorial Park in Bladensburg, Maryland.

11. I have obtained information regarding the dimensions of the Memorials, located in Veteran's Memorial Park including the Bladensburg World War I Memorial, War of 1812, World War II, Pearl Harbor, the Korea and Vietnam Wars, and the tribute to those who perished on September 11, 2001.

12. I have also obtained the approximate distance to each of the other Memorials from the Bladensburg World War I Memorial.

13. The Bladensburg World War I Memorial was erected in 1925 and stands approximately 32 feet high from the ground to the top. The horizontal arms of the Memorial are a total of approximately 15 feet. The Memorial rests upon a square concrete pedestal with each side measuring 15 feet. The Memorial plaque is $2^{1/2}$ feet by 9 feet.

14. The War of 1812 Memorial is a rectangular, concrete structure which was installed in 2014. It is approximately 17 feet high, 17 feet wide and 3 feet deep. It is located approximately 300 feet from the Bladensburg World War I Memorial.

15. The World War II Memorial has a height of 14

feet. It is a concrete structure that is approximately 10 feet wide and 4 feet deep. It was installed in 1944 and is located approximately 207 feet from the Bladensburg World War I Memorial.

16. The Pearl Harbor Memorial has a height of approximately 2 feet. It is composed of a square plaque affixed to a wooden post with each side measuring approximately .70 feet wide and .70 feet deep. I am unsure of the year of its installation but can attest that it has been situated at its present location throughout my employment with the Commission. The Pearl Harbor Memorial is located approximately 240 feet from the Bladensburg World War I Memorial.

17. The Korea and Vietnam Memorial is a single concrete structure approximately 6 feet in height. It is 14 feet wide and 4 feet deep. It is located approximately 199 feet from the Bladensburg World War I Memorial.

18. The September 11, 2001 Memorial is approximately 1 foot in height. It is a granite, arc-shaped structure 56 feet wide and located within a memorial garden approximately 269 feet from the Bladensburg World War I Memorial.

19. In 2010, I was appointed as the Commission's representative to the War of 1812/Battle of Bladensburg Commemoration Task Force.

20. The task force, appointed by the Mayor of Bladensburg, was led by the Anacostia Trails Heritage Area, Inc. and comprised of representatives from the Anacostia Watershed Society, the Port Towns CDC, Prince George's Heritage, the Friends of the Battle of Bladensburg, the Aman Memorial Trust, Prince

George's County Councilwoman Harrison, representatives from the Port Towns, and the Maryland-National Capital Park and Planning Commission.

21. The War of 1812/Battle of Bladensburg Commemoration Task Force generated ideas for a variety of monuments and events to honor the 200th Anniversary of the military battle, including the creation and installation of a new monument depicting aluminum soldiers during the Battle of Bladensburg.

22. Each soldier marker will be at least 38 feet tall and will bolted to a poured concrete base. The soldier depicting the invading British army will be painted red and placed between the levee and the road on the east side of the northeast branch of the Anacostia River, near the existing monuments in Veterans Memorial Park. The soldier representing the defending American forces will be painted blue and placed in the across the Anacostia River toward Washington, D.C.

23. The Commission anticipates that the Memorial depicting these soldiers will be installed by late Summer 2015.

Executed on this 10 day of June, 2015.

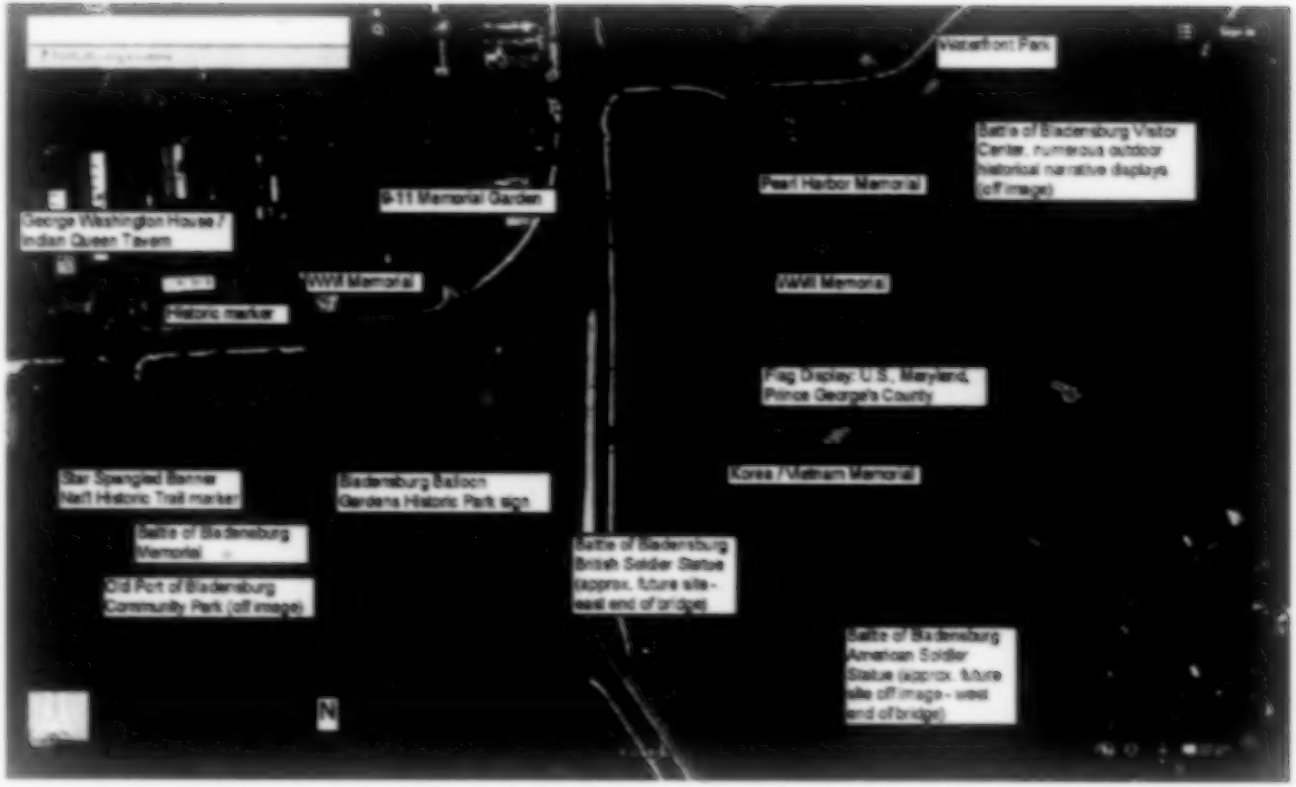
s/ Edward Day

Edward Day

APPENDIX F

Google Maps image of Veterans Memorial Park and surrounding area (labels added)

[*see next page*]


Waterfront Park
Battle of Bladensburg Visitor Center, numerous outdoor historical narrative displays (off image)
Pearl Harbor Memorial
9-11 Memorial Garden
George Washington House / Indian Queen Tavern
WWII Memorial
Historic marker
WWII Memorial
Flag Display: U.S., Maryland, Prince George's County
Star Spangled Banner Nat'l Historic Trail marker
Bladensburg Baloon Gardens Historic Park sign
Korea / Vietnam Memorial
Battle of Bladensburg Memorial
Old Port of Bladensburg Community Park (off image)
Battle of Bladensburg British Soldier Statue (approx. future site - east end of bridge)
Battle of Bladensburg American Soldier Statue (approx. future site off image - west end of bridge)
N